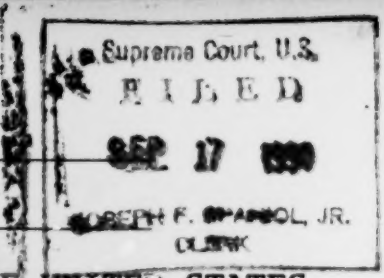
90-473



NO. 90-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

JOSEPH BARTLETT, JR.,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

VICKI GOTKIN ADLER
(Counsel of Record)
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686
(State Bar No. 006874)

Attorneys for PETITIONER

Questions Presented

1. Did the Arizona Supreme Court misapply the federal constitutional doctrine set forth in Solem v. Helm, 463 U.S. 277 (1983), by finding that the 40-year sentence Bartlett received for engaging in "nonviolent, nonincestuous, heterosexual, and consensual sexual intercourse with two willing post-pubescent teenagers," constituted cruel and unusual punishment under the eighth amendment to the United States Constitution?

2. Should this Court revisit Solem v. Helm, because it has opened the floodgates to appellate review of sentences solely of imprisonment and has resulted in conflicting applications of its doctrine?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
IN MAKING A BREAK FROM TRADITIONAL EIGHTH AMENDMENT ANALYSIS BY EXAMINING SENTENCES OF IMPRISONMENT, AS WELL AS THE MANNER IN WHICH SENTENCES ARE CARRIED OUT, SOLEM v. HELM SET FORTH AN UNWORKABLE TEST TO DETERMINE WHETHER A GIVEN SENTENCE IS PROPORTIONAL TO A GIVEN CRIME; THIS HOLDING CREATED A JUDICIAL ABERRATION, WHICH THE DISSENT FORESAW WOULD RESULT IN CONSTITUTIONAL CHAOS, A RESULT THAT HAS COME TO PASS.	11
A. HISTORY DEMONSTRATES THE JUDICIAL EVOLUTION THAT OCCURRED BETWEEN RUMMEL v. ESTELLE AND SOLEM v. HELM.	11
B. CHIEF JUSTICE BURGER'S PROPHECY HAS BECOME REALITY.	13

C. COURTS HAVE PLACED DIFFERENT INTERPRETATIONS UPON THE DOCTRINE SET FORTH IN SOLEM v. HELM, THEREBY MAKING COMPARISONS REQUIRED THEREUNDER IMPOSSIBLE. 18

D. THE ARIZONA SUPREME COURT MISAPPLIED THE DOCTRINE SET FORTH IN SOLEM v. HELM, FELL INTO CONFLICT WITH OTHER JURISDICTIONS IN DOING THE EIGHTH AMENDMENT ANALYSIS, AND FULFILLED EACH OF CHIEF JUSTICE BURGER'S PREDICTIONS. 20

CONCLUSION 33

TABLE OF CASES AND AUTHORITIES

Case	Page
Cocio v. Bramlett 872 F.2d 889 (9th Cir. 1989)	19
Donahoo v. State 505 So. 2d 1067 (Ala. Crim. App. 1986)	17
Maddox v. State 502 So. 2d 790 (Ala. 1986)	16
Marrero v. Wainwright 823 F.2d 1468 (11th Cir. 1987)	18
McClesky v. Kemp 481 U.S. 279 (1987)	29,30
McLester v. State 460 So. 2d 870 (Ala. Crim. App. 1984)	17
Pulley v. Harris 465 U.S. 37 (1984)	29
Rummel v. Estelle 445 U.S. 263 (1980)	11,13,15
Solem v. Helm 463 U.S. 277 (1983)	Passim
State v. Bartlett 2 CA-CR 88-0024 memo. dec. (Nov. 10, 1988)	1
State v. Bartlett ___ Ariz. ___ 792 P.2d 692 (1990)	Passim

State v. Davis
310 Md. 611
530 A.2d 1223 (Md. 1987) 19

Teeter v. State
499 A.2d 503
(Md. App. 1985) 20

United States v. Rhodes
779 F.2d 1019
(4th Cir. 1985) 17

Webb v. State
539 So. 2d 343
(Ala. Crim. App. 1987) 17

Weems v. United States
271 U.S. 349 (1910) 31

Authorities

28 U.S.C.
§ 1257(a) 2

Arizona Revised Statutes
§ 13-604(H) 7
§ 13-604.01 1,2,3,9,10,21,28
§ 13-1405 7,10,21,28
§ 13-1407(B) 5

OPINIONS BELOW

The Arizona Court of Appeals, Division II, issued a memorandum decision in this case on November 10, 1988, affirming Bartlett's sentences of imprisonment. State v. Bartlett, 2 CA-CR 88-0024, memo. dec. (Nov. 10, 1988), appended herein as Appendix A.

The Arizona Supreme Court granted review and issued its opinion on April 17, 1990. The court held that Bartlett's mandatory sentence under A.R.S. § 13-604.01 was so disproportionately severe that it violated this Court's proscription against cruel and unusual punishment as interpreted in Solem v. Helm, 463 U.S. 277 (1983). The opinion is reported at ___ Ariz. ____, 792 P.2d 692 (1990), and is appended to this petition as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court, which the state asks this Court to review, was entered on April 17, 1990. The Arizona

Supreme Court denied petitioner's timely motion for reconsideration on June 19, 1990. This petition is filed within 90 days from that denial, on or before September 17, 1990. The state invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent part of the Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

A.R.S. § 13-1405 provides:

> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a person who is under 18 years of age.
>
> B. Sexual conduct with a minor under 15 years of age is a class 2 felony and is punishable pursuant to § 13-604.01. Sexual conduct with a minor 15 years of age or over is a class 6 felony.

(Emphasis added.)

A.R.S. § 13-604.01, a copy of which is appended to this petition as Appendix C, sets forth the disposition for dangerous crimes committed against children.

STATEMENT OF THE CASE

Heather T.[1] met Bartlett at a restaurant, which local high-schoolers frequented during their lunch breaks. On the day following their initial meeting, Bartlett came to Heather's house, where Heather told him that she was 14 years old. Soon thereafter, Heather ran away from home, and began "dating" Bartlett.

During the 3-month period during which they dated, Heather missed approximately 35 days of school. She soon moved into Bartlett's trailer, where they engaged in sexual intercourse. Heather stopped dating Bartlett because she learned that

---

1. For the sake of preserving the anonymity of the victims, only their first names and last initials will be used herein.

he had also been having sexual intercourse with her friends. Heather confronted Bartlett with these rumors, and Bartlett freely admitted that he had been "messing around" with Rebecca G. and Lisa D. Bartlett was also married, had three children, and was living with his estranged wife during all of these events.

Lisa D. also met Bartlett at the same restaurant across from the high school. Shortly after meeting him, she told him her age. In early December, 1986, Lisa and Bartlett had sexual intercourse in his trailer.

A third victim, Rebecca G., also met Bartlett in the parking lot of the restaurant across from the school. Rebecca accompanied Bartlett to his trailer on one occasion, where she, Bartlett, his roommate, and another girl, Sherrill G., played strip poker and drank beer. Sometime during the evening, Rebecca went back to Bartlett's bedroom,

where they had sexual intercourse. Rebecca was only 15 at the time, but never told Bartlett her age.[2]

On January 10, 1986, police responded to the home of Lisa D.'s mother, who accidentally discharged a weapon after learning that her 14-year-old daughter, Lisa (the victim in Count II of the indictment), had had sex with Bartlett. After confiscating the weapon, police directed Mrs. D. to the Sierra Vista Police Department, where she filed a complaint against Bartlett on January 12, 1986.

After learning that police were looking for him, Bartlett, age 23, appeared at the police station some time later that day. A police officer told Bartlett that

---

2. Although this is not a legal defense to sexual conduct with a minor under the age of 15 years, it is a defense when the victim is 15 or older, and the defendant did not know or could not reasonably have known the victim's age. A.R.S. § 13-1407(B).

Mrs. D. had accused him of sexually assaulting her daughter, Lisa. Bartlett admitted that he and the 14-year-old had had sex together. He also admitted having sexual relations with another 14-year-old, Heather T. (the subject of Count III of the indictment). He further admitted that he knew that the sexual activity was wrong and that it was against the law, and that he had learned this during law enforcement training he had taken previously.

On January 23, 1987, the Cochise County Grand Jury indicted Bartlett on 3 counts of sexual conduct with a minor, involving Rebecca G., a 15-year-old, Lisa D.[3], and Heather T.,[4] each of whom was 14 years old. The state thereafter moved

---

3. In the Arizona Supreme Court's opinion, it refers to this victim as "Mary."

4. The Arizona Supreme Court refers to this victim as "Susan."

to invoke the enhanced punishment provisions of A.R.S. § 13-604(H).

Bartlett absconded prior to trial. The court found Bartlett's absence voluntary and tried him in absentia. The jurors returned verdicts of guilty to sexual conduct with a minor with respect to both Heather and Lisa; however, they acquitted Bartlett on the count involving Rebecca.

Five months after the jurors convicted Bartlett, he was arrested and the trial court entered judgment of guilt to two counts of sexual conduct with a minor under the age of 15, each a class 2 felony and dangerous crime against children, pursuant to A.R.S. §§ 13-1405 and 13-604.01.

During presentence interviews, Bartlett reported that he had been sexually active since the age of 5. He claimed that he first had sexual intercourse at the age of 9 with a girl of the same age. Bartlett noted several other sexual

experiences with what he characterized as "loose girls" at the age of 10 and 11. Bartlett claimed that the girls "came onto" him and he would merely respond.

According to a psychologist who examined Bartlett in August 1987, Bartlett made threatening remarks, stating, "I'm going to make sure those girls are dead if I go to prison."

The probation officer concluded that Bartlett never took full responsibility for his actions, relying, instead, upon his characterizations of all the girls with whom he had been intimate as "loose." Bartlett's participation in all of these encounters, by his account, was merely passive.

The presentence officer believed that Bartlett would be a threat to young girls in the future. His apparent inability to maintain lasting relationships with women his own age and his feelings of inferiority perpetuated his desire for young teens.

Despite a recommendation for the presumptive term of 50 years, the trial court imposed the mitigated minimum term of 40 years. Bartlett will not be eligible for release until the sentence is served.

Bartlett's original appeal to the Arizona Court of Appeals challenged the constitutionality of the sentence, but acknowledged that A.R.S. § 13-604.01 was constitutional on its face. He claimed that, as applied to him, the sentence imposed constituted cruel and unusual punishment in violation of the United States Constitution. The court of appeals affirmed the sentence.

On petition for review, the Arizona Supreme Court applied an extended analysis under Solem v. Helm, 463 U.S. 277 (1983), and concluded that Bartlett's sentences were unconstitutionally cruel and unusual. Acknowledging that Bartlett received the minimum sentence allowed by

law, and noting that there was no more lenient sentence to which Bartlett could be sentenced under the provisions of § 13-604.01, it nevertheless severed the concededly constitutional provisions requiring mandatory sentencing from the substantive provisions of A.R.S. § 13-1405, and remanded the case for resentencing, classifying Bartlett as a class 2 felon without the enhanced penalties required by the legislature for dangerous crimes committed against children.[5]

---

5. Under the dangerous crimes against children legislation, the trial court had discretion to sentence Bartlett to a term between 40 and 60 years, but had to impose prison within this range, and parole was not permitted.

REASONS FOR GRANTING THE WRIT

IN MAKING A BREAK FROM TRADITIONAL EIGHTH AMENDMENT ANALYSIS BY EXAMINING SENTENCES OF IMPRISONMENT, AS WELL AS THE MANNER IN WHICH SENTENCES ARE CARRIED OUT, SOLEM v. HELM SET FORTH AN UNWORKABLE TEST TO DETERMINE WHETHER A GIVEN SENTENCE IS PROPORTIONAL TO A GIVEN CRIME; THIS HOLDING CREATED A JUDICIAL ABERRATION, WHICH THE DISSENT FORESAW WOULD RESULT IN CONSTITUTIONAL CHAOS, A RESULT THAT HAS COME TO PASS.

A. HISTORY DEMONSTRATES THE JUDICIAL EVOLUTION THAT OCCURRED BETWEEN RUMMEL v. ESTELLE AND SOLEM v. HELM.

In Rummel v. Estelle, 445 U.S. 263 (1980), this Court specifically rejected the invitation to extend eighth amendment analysis to challenges solely of sentences of imprisonment, finding:

> Given the unique nature of the punishments considered in Weems [v. United States] and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel, 445 U.S. at 274. This Court found it difficult, if not impossible, to

differentiate between one term of years for a specific crime and another term of years, and refused to engage in that "line-drawing" that is peculiarly the province of the legislatures. Id. at 275. Rummel specifically asked the Court to apply "objective" criteria to determine that his sentence was out of sync with the majority of states whose sentencing provisions were markedly different from the recidivist statute under which he was sentenced to life imprisonment. The majority of this Court rejected these objective criteria, saying:

> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

Id. at 283.

Three years later, this Court issued its opinion in Solem v. Helm, 463 U.S. 277 (1983), in which it appeared to embrace the objective criteria it had recently rejected

in Rummel, without overruling that decision. In Solem, this Court set forth an "objective" test to determine whether a given sentence was proportional to a given crime. Factors that a court should consider include:

> (1) Looking at the gravity of the offense and the harshness of the penalty;
> (2) Comparing the sentences imposed on other criminals in the same jurisdiction; and
> (3) Comparing the sentences imposed for the same crimes in other jurisdictions.

Id. at 290-91. The Court completely unraveled its prior precedent and opened the doors to proportionality challenges such as the one before this Court.

B. CHIEF JUSTICE BURGER'S PROPHECY HAS BECOME REALITY.

The concerns outlined by the Rummel majority are the same as those concerns expressed by Chief Justice Burger, writing for the four-member dissent in Solem v. Helm. Chief Justice Burger wrote:

> The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of stare decisis, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases.

Solem v. Helm, 463 U.S. at 304. Chief Justice Burger warned that the majority's decision in Solem would allow appellate judges to substitute their own sense of what is proportional and what is not proportional, undermine the authority given to legislatures to define crimes and determine punishments, and subject all sentences of imprisonment to appellate scrutiny. Id. at 305.

Chief Justice Burger, pointing out the futility of comparing disparate crimes and punishments, reiterated:

> It is one thing for a Court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a Court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix.

Rummel, 445 U.S. at 281. The Chief Justice warned that making comparisons among the various states tramples on the fundamental concepts of federalism, and ignores the implication of various legislatures' recognition of different societal interests. Such comparisons are thus rendered speculative at best.

Chief Justice Burger attempted to set forth some hypothetical examples of what the future would bring:

> Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes.

Solem v. Helm, 463 U.S. at 314-15.

Just as Chief Justice Burger warned, the majority's opinion in Solem v. Helm provided no guidelines for implementation of the tests set forth therein. There is

no meaningful way to measure the weight to be given to certain offenses, or the legislative intent behind the enactment of certain penalties. The Chief Justice feared that the majority's decision would flood appellate courts with cases challenging sentences on eighth amendment grounds and "administer the coup de grace to the courts of appeals as we know them." Solem v. Helm, 463 U.S. at 316. As the statistics reported below demonstrate, the Chief Justice's fears have indeed become a reality, as the appellate courts have been flooded with challenges to the proportionality of sentences, following the Solem v. Helm decision.[6]

---

6. As of September 5, 1990, there were 772 reported decisions citing Solem v. Helm. Of those cases reviewed, it is apparent that various state and federal courts interpret the mandate of Solem differently. Some interpret the case to require review only of sentences of life imprisonment without the possibility of parole [Maddox v. State, 502 So. 2d 790 (Ala. 1986); McLester v. State, 460 So. 2d 870, 873-75 n.2 (Ala. Crim. App. 1984);

However, actual comparisons among states are impossible, given the varieties of sentences available for a variety of different criminals. The instant case is a prime example. The charts set forth in Appendix E demonstrate that numerous factors play upon what any given defendant may receive as a sentence for a similar crime. These variables and permutations complicate and obscure any meaningful analysis, and demonstrate the lack of objectivity inherent in the tests outlined by the Solem Court.

(Footnote 6 continued)
Webb v. State, 539 So. 2d 343 (Ala. Crim. App. 1987); Donahoo v. State, 505 So. 2d 1067 (Ala. Crim. App. 1986). See United States v. Rhodes, 779 F.2d 1019, 1027-28 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986)]; while others seem to put each sentence before it through the rigors of a Solem analysis. A comparison of the different interpretations of the eighth amendment spawned by Solem is discussed infra at 20.

C. COURTS HAVE PLACED DIFFERENT INTERPRETATIONS UPON THE DOCTRINE SET FORTH IN SOLEM v. HELM, THEREBY MAKING COMPARISONS REQUIRED THEREUNDER IMPOSSIBLE.

As mentioned earlier, there is a vast uncertainty among state and federal courts about the meaning of the tests set forth in Solem v. Helm, and the cases to which they apply. In Marrero v. Wainwright, 823 F.2d 1468, 1470 (11th Cir. 1987), the Eleventh Circuit Court of Appeals rejected the argument propounded by the government that only those cases involving ineligibility for parole were subject to review under Solem.

In contrast to the Marrero decision, the Alabama courts and the Fourth Circuit Court of Appeals have held that the Solem v. Helm analysis is to be applied only in cases involving sentences of life without the possibility of parole. See footnote 6, supra.

In Maryland, when applying the second prong of the Solem v. Helm test, the

court compares defendants who have committed crimes within the same category of offenses. See State v. Davis, 310 Md. 611, 530 A.2d 1223 (Md. 1987). The Maryland court looks at particular categories of crimes, and the punishments set forth therefor. If all defendants who commit a particular class of crime are sentenced similarly, the inquiry ends under this prong of the Solem test. The Ninth Circuit Court of Appeals has interpreted Solem and upheld sentences challenged under the second prong, because all offenders who committed crimes while released from confinement were treated alike. Cocio v. Bramlett, 872 F.2d 889 (9th Cir. 1989). By contrast, the Arizona Supreme Court held that a court must look at punishments for any and all crimes that can be committed within a jurisdiction to meet the Solem test. Bartlett, 792 P.2d at 699.

Under the third prong of Solem, both Maryland and the fourth circuit subscribe to the interpretation that Solem requires a comparison of what sentences could be imposed in other jurisdictions, not merely what sentences actually have been imposed. State v. Davis; United States v. Rhodes; Teeter v. State, 499 A.2d 503 (Md. App. 1985). By contrast, the Arizona court stated it must look at other sentences actually imposed, to meet the Solem test. Bartlett, 792 P.2d at 700-03.

D. THE ARIZONA SUPREME COURT MISAPPLIED THE DOCTRINE SET FORTH IN SOLEM v. HELM, FELL INTO CONFLICT WITH OTHER JURISDICTIONS IN DOING THE EIGHTH AMENDMENT ANALYSIS, AND FULFILLED EACH OF CHIEF JUSTICE BURGER'S PREDICTIONS.

The Arizona Supreme Court erred as a matter of federal constitutional law by failing to properly apply the proportionality tests set forth in Solem v. Helm to Bartlett's sentences. The Arizona Supreme Court's decision is

directly in conflict with opinions of other states' highest courts. In fashioning a remedy for the wrong perceived to have been committed against Bartlett in sentencing him, the Arizona Supreme Court formulated an unlawful resolution. The court impermissibly disregarded the mandates of the Arizona legislature in defining the crimes Bartlett committed, and redefined his crimes, so that Bartlett could be sentenced to a range within parameters the Arizona Supreme Court promulgated.

Both Lisa and Heather were under the age of 15 years; therefore, Bartlett's crimes constituted class 2 felonies, and the court was bound to apply the sentencing provisions of the dangerous crimes against children act. See A.R.S. §§ 13-1405; 13-604.01.

The Arizona Supreme Court concluded that the sentences imposed upon Bartlett were grossly disproportionate to his

crimes "involving participation in nonviolent, nonincestuous, heterosexual, and consensual sexual intercourse with two willing post-pubescent teenagers." State v. Bartlett, 792 P.2d at 696. It nevertheless found the sentencing statute facially valid.

Although the Arizona Supreme Court noted that it had a duty to give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," it nevertheless determined that Bartlett's sentences were constitutionally invalid. The Arizona Supreme Court determined that the court was the body charged with judging the moral sense of the community, and concluded it must analyze each challenge to the constitutionality of a sentence on a case-by-case basis:

> according to the circumstances of the particular crime, the defendant's personal culpability,

> and by the perceptions of contemporary society at the time the decision is rendered . . . .

Bartlett, 792 P.2d at 696.

The Arizona Supreme Court limited its inquiry under all prongs of the Solem test, in order to satisfy its conclusion that the sentences imposed were unconstitutionally cruel and unusual.

In reassessing the gravity of the offense and harshness of the penalty, the Arizona Supreme Court directly supplanted its values for those of the people of Arizona. The Arizona Legislature enacted the dangerous crimes against children legislation in response to great public outcry resulting from heinous and repeated crimes of sexual offenses and murders of children taking place in Arizona in the early 1980s. Minutes of the Arizona legislature, demonstrating the public's concern and support of this legislation, is attached hereto as Appendix D. The Arizona Supreme Court

determined, however, that, because the victims in this case were nearly 15 years of age, sexually sophisticated, and willing participants in the sexual activity, Bartlett's crimes were less serious offenses, despite the legislature's mandates to the contrary. The court reasoned that Bartlett should be treated more like defendants who engaged in sexual conduct with minors between the ages of 15 and 18.

The legislature clearly determined that consent and proximity to one's 15th birthday were irrelevant to culpability under the statute prohibiting sexual conduct with minors, but the court stated:

> Additionally, we must consider the minors' proximities to their 15th birthdays.
>
> Although the legislature may be forced to draw a "bright line" at a particular age (in this case at the age of 15) in distinguishing between class 6 and class 2 sexual conduct felonies, a reviewing court can look at a more graduated line, depending upon the nature of the individual offense, in

> deciding the proportionality of the punishment to the crime. Thus, although the fact that both consenting girls were close to their 15th birthdays cannot be used to reduce the crimes from class 2 felonies to class 6 felonies, the punishment imposed for those harsher class 2 felonies must be proportionate to these individual offenses.

Bartlett, 792 P.2d at 698 (emphasis added).

The Arizona Supreme Court thus missapplied the first prong of the Solem test by looking more at subjective factors, coupled with the individual views of the justices reviewing the case, to minimize the gravity of the offense and to justify its result.

In applying the second prong of the Solem v. Helm test, the Arizona Supreme Court "examine[d] the sentences imposed in Arizona on defendants who commit crimes more serious than this defendant's." Bartlett, 792 P.2d at 699. See Solem, 463 U.S. at 292. The Arizona Supreme Court rejected the argument that it should

compare sentences for crimes of similar gravity, i.e., crimes committed against children. It insisted that, because similar crimes against adults result in lighter sentences, Bartlett's sentences are unconstitutionally disproportionate. Bartlett, 792 P.2d at 699.

Under the third prong of the Solem test, the Arizona Supreme Court "examine[d] the punishment imposed for the same crime in other jurisdictions." Solem v. Helm, 463 U.S. at 292. Without regard to the sentences imposable in other jurisdictions for crimes arguably identical to the crimes committed by Bartlett, the Arizona Supreme Court limited its comparison only to those sentences actually imposed and memorialized in published opinions of other courts, where the combination of mandatory sentencing, repeat offender classification, parole ineligibility, and identity of elements coalesced.

Petitioner submits that, in applying the third prong of the Solem v. Helm test, appellate courts must look not only to what sentences actually have been imposed by courts exercising discretion under the facts of particular cases, but also to those sentences imposable under the statutory schemes of the various state legislatures. Petitioner provided the Arizona Supreme Court with charts indicating the crimes most closely comparable to the crimes Bartlett committed, and noted that, in 26 other jurisdictions, Bartlett could have received at least as severe a punishment as the sentence he received in Arizona.[7]

Acknowledging that this Court has said that successful challenges to the proportionality of particular sentences

---

7. See Appendix E attached hereto, reflecting the sentencing provisions from the other 49 states, the District of Columbia and the Virgin Islands.

are "exceedingly rare," the Arizona Supreme Court found this to be such a rare case. State v. Bartlett, 792 P.2d at 703. Faced with the task of formulating a remedy, the court recognized that it could not reduce the sentence without obliterating the mandatory sentencing provisions from A.R.S. § 13-1405, and redefining Bartlett's crimes. It thus did so by severing concededly constitutional sentencing provisions and declaring them inapplicable to Bartlett, all under the authority of the eighth amendment. The result is that Bartlett may now be sentenced to less than the statutory minimum.

The Arizona Supreme Court's analysis under Solem v. Helm, although purportedly limited to the facts before it, opens the floodgates to similar challenges under the mandatory provisions of A.R.S. § 13-604.01, and has the effect of

undermining the legislative determinations in each of those potential challenges.

Although death penalty cases have always stood in a class of their own, they are instructive on the issue of whether proportionality analysis, as it now exists under Solem v. Helm, is required at all. In McClesky v. Kemp, 481 U.S. 279 (1987), this Court found that inconsistency in sentences is tolerable in a federalistic society, and:

> [W]here the statutory procedures adequately channeled the sentencer's discretion, such proportionality review is not constitutionally required.

Id. at ___ n. 28, 107 S. Ct. 1775 n. 28, 95 L. Ed. 2d 262 (emphasis added). See also Pulley v. Harris, 465 U.S. 37, 50-51 (1984). McClesky held that, absent a showing that a capital punishment system operates in an arbitrary and capricious manner, a defendant cannot prove a constitutional violation by demonstrating

that other defendants who may be similarly situated did not receive the same penalty. McClesky, 481 U.S. 279 at ___, 107 S. Ct. 1756 at 1774, 95 L. Ed. 2d at 262.

For the same reasons cited in McClesky as rendering proportionality analysis difficult, if not impossible, the permutations of varying states' sentencing provisions in non-death penalty cases is mind boggling. Given the nuances of sentencing factors and the variables of each individual case, a meaningful comparison can never be done under the Arizona Supreme Court's formulation of the Solem v. Helm rule.

It seems odd that, in death penalty cases, proportionality review is not required; however, in cases not involving the death penalty, but subject to great variations in punishments for differently defined crimes, such analysis is required. The Arizona Supreme Court's interpretation

of Solem v. Helm appears to sanction such review whenever it is requested.

Absent egregious punishments, such as those inflicted in Weems v. United States, 271 U.S. 349 (1910), an appellate court should not undertake an extensive proportionality analysis, as the Arizona Supreme Court thought justified in the case before this Court.

Based upon the Arizona Supreme Court's erroneous application of Solem v. Helm, on resentencing, Bartlett could serve as little as one additional year in prison, for crimes the legislature mandated should be punished for no less than 40 years.

Petitioner submits that, in reaching this result, the Arizona Supreme Court erred by misapplying the constitutional doctrine set forth in Solem v. Helm, invaded the legislative domain by substituting its judgment for that of the

People of the State of Arizona, and formulated an unlawful sentencing remedy by classifying Bartlett as a "regular" class 2 felon, instead of a dangerous criminal. The result is that Bartlett will now be sentenced to a term less than the statutory minimum for the crimes he committed.

Petitioner asks this Court to accept review of this matter to reexamine Solem v. Helm, to determine whether the Arizona Supreme Court misapplied that case, and to resolve the great conflict that exists across the country among courts regarding the appropriate cases to which to apply Solem v. Helm. In its present framework, Solem v. Helm is unworkable, and should either be modified or overruled.

CONCLUSION

The Arizona Supreme Court misinterpreted and misapplied the doctrine set forth in Solem v. Helm in finding the mandatory minimum sentence for 2 counts of sexual conduct with minors, defined as dangerous crimes against children, unconstitutionally cruel and unusual in violation of the eighth amendment to the United States Constitution. Additionally, the Arizona Supreme Court flagrantly overreached its authority by reclassifying Bartlett's crimes and permitting him to be sentenced to less than the statutory minimum.

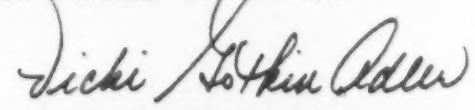
Because Arizona's analysis conflicts with this Court's and other courts' eighth amendment analyses, petitioner urges this Court to accept review, and to overrule the Arizona Supreme Court's determination that the sentences imposed upon Bartlett are unconstitutional. Since these sentences could be imposed upon others similarly situated in 26 other jurisdictions, and

upon other dangerous criminals who commit crimes in the State of Arizona against Arizona's children, Bartlett's sentences pass constitutional muster and should be upheld. Petitioner therefore urges this Court to step back from its holding in Solem v. Helm and save its eighth amendment review for cases truly warranting it. In the alternative, petitioner asks this Court to modify that decision to afford litigants guidance in applying the criteria set forth therein.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division



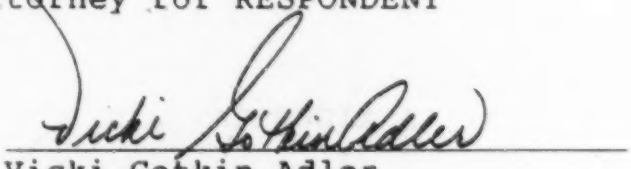
VICKI GOTKIN ADLER
(Counsel of Record)
Assistant Attorney General

Attorneys for PETITIONER

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 13th day of September, 1990, to:

DAVID FLANNIGAN
P.O. Box 4340
Bisbee, Arizona 85603
Attorney for RESPONDENT



Vicki Gotkin Adler
Assistant Attorney General
Criminal Division
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007

CRM88-0227/4616D/ch

APPENDIX A

[Filed November 10, 1988]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSEPH BARTLETT, JR., Appellant.	2 CA-CR 88-0024 Department A MEMORANDUM DECISION Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF
COCHISE COUNTY

Cause No. CR 87-00020

Honorable Richard A. Winkler, Judge

AFFIRMED

Robert K. Corbin, The Attorney General
by William J. Schafer III and
Vicki Gotkin Adler Phoenix
Attorneys for Appellee

David P. Flannigan Bisbee

Attorney for Appellant

L I V E R M O R E, Presiding Judge.

In this appeal from a conviction of two counts of sexual conduct with a minor under age 15, the defendant contends that his confession was involuntary and that his forty-year sentence is unconstitutionally excessive. We disagree and affirm.

The facts surrounding the confession are that the defendant came to the police station with a friend because he had learned that police had made inquiries concerning him. In a short conversation with an officer, defendant admitted the acts leading to his convictions. He then left the station. Because defendant was not in custody, no Miranda warnings were required. State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988). Because no coercive police tactics were used, the admissions were voluntary. State v. Tucker, ___ Ariz. ___, 759 P.2d 579 (1988).

Defendant's argument that the long sentence imposed for sexual conduct with a

minor violates the constitutional proscription against cruel and unusual punishment has been twice rejected by this court. State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987); State v. Crego, 154 Ariz. 278, 742 P.2d 289 (App. 1987). We do so again. The remainder of his argument is a heartfelt objection to the consequences of mandatory sentencing on the facts of this case. That is better addressed to the legislature. We do not believe courts have either inherent power or power under A.R.S. § 13-4037 to impose a sentence below the statutory minimum.

Affirmed.

JOSEPH M. LIVERMORE, Presiding Judge

CONCURRING:

JAMES D. HATHAWAY, Judge

LAWRENCE HOWARD, Judge

APPENDIX B

[Filed April 17, 1990]

IN THE SUPREME COURT OF THE STATE
OF ARIZONA
EN BANC

STATE OF ARIZONA,	)	Supreme Court
	)	CR-88-0411-PR
Appellee,	)	
	)	Court of Appeals
v.	)	2 CA-CR 88-0024
	)	
JOSEPH BARTLETT, JR.,	)	Cochise County
	)	CR-87-00020
Appellant.	)	
	)	O P I N I O N
	)	

Appeal from the Superior Court
of Cochise County

The Honorable Richard A. Winkler, Judge

REMANDED FOR SENTENCING

Memorandum Decision of the Court
of Appeals, Division Two

(filed Nov. 10, 1988)

VACATED IN PART

Robert K. Corbin, Attorney General
by Bruce M. Ferg, Assistant
Attorney General Tucson
Vicki Gotkin Adler, Assistant
Attorney General Phoenix
Attorneys for Appellee

David P. Flannigan
Attorney for Appellant Bisbee

Robert F. Arentz, Cochise County Public Defender
by James L. Conlogue, Deputy Public Defender
Amicus Curiae for Cochise County Public Defender Bisbee

Harrison, Harper, Christian & Dichter, P.C.
by Stephen M. Dichter
Amicus Curiae for Arizona Attorneys for Criminal Justice Phoenix

---

C O R C O R A N, Justice

Defendant Joseph Bartlett, Jr. (defendant) petitions for review of the court of appeals decision affirming his convictions for two counts of sexual conduct with a minor under 15 years of age, class 2 felonies and dangerous crimes against children, and the resulting mandatory minimum consecutive sentences totalling 40 years without possibility of early release. We granted review to determine whether these sentences constitute cruel and unusual punishment and ordered the parties to

submit supplemental briefing addressing the following questions.

> 1. Under the facts of this case, is the mandatory sentence required by A.R.S. § 13-604.01 so disproportionately severe that it violates those provisions of the state and federal constitutions that prohibit cruel and unusual punishment?
>
> 2. If the mandatory sentence prescribed by the applicable statute is unconstitutional as applied to the facts of the crime, what is the proper disposition?

We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. § 12-120.24. For the reasons that follow, we hold that the sentences imposed are disproportionate to defendant's crimes under the analysis required by Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), and thus were unconstitutionally imposed. We therefore remand the matter for resentencing.

Factual and Procedural Background

In September 1986, defendant, then 23 years old, was introduced through a

mutual friend to a 9th grade student whom we shall call Mary,[1] then 14 1/2 years old. Defendant and Mary saw each other every day in September, October, and November, 1986, dated occasionally, and, according to Mary, considered themselves "boyfriend and girlfriend." In December 1986 Mary ran away from her father's home, where she had been living, and stayed with defendant for 4 days before moving back to her mother's home. Mary testified that she and defendant became physically intimate sometime in December 1986, when she voluntarily had sexual intercourse

---

[1] We will use fictitious names for the two teenage girls involved in this case. This is in accordance with our policy of October 24, 1989, in which the Chief Justice advised all appellate judges "to avoid, where possible, referring by name in appellate opinions to individual victims or witnesses who are minors or victims of crimes, where naming them would cause them danger or unnecessary embarrassment. Referring by name should occur only where it is absolutely necessary for clarity.

with him. At that time, Mary was two months short of her 15th birthday.

During the fall of 1986, Mary introduced defendant to her 14 1/2-year-old friend, whom we shall call Susan. Defendant lived in the same trailer park as Susan, and Susan often ate lunch with Mary and defendant at the parking lot across the street from the high school that Mary and Susan attended. Susan testified that defendant did not act like he was 23, but was "immature" in that he behaved like and associated with young teenagers. In early December 1986, Susan went to defendant's home and voluntarily had sexual intercourse with him; at the time, Susan was 6 months short of her 15th birthday.

Mary terminated her relationship with defendant around March 1987, when he admitted to "messing around" with some of her friends. Susan did not continue her

sexual relationship with defendant after the initial incident.

In January 1987, police responded to a report of an accidental discharge of a weapon at defendant's trailer park when Susan's mother went looking for defendant after learning of her daughter's sexual encounter with him. The officers confiscated the weapon. The mother filed a complaint, alleging that defendant had forcibly sexually assaulted her 14-year-old daughter. When defendant heard from neighbors that police had inquired about him at the trailer park, he voluntarily went to the police station to find out why they were looking for him. Officer Robert Pearce invited defendant into his back office to talk, and informed defendant that the girl's mother had reported his forcible sexual assault of the 14-year-old. Defendant denied the mother's accusation and told Officer Pearce that he and Susan had consensual intercourse on one occasion, which he alleged was initiated by Susan

when she came to his home. The officer also asked about defendant's relationship with Mary; defendant admitted that he had consensual sexual intercourse with Mary while they were dating. Officer Pearce taped most of defendant's statements but did not arrest defendant after the interview.

Susan later recanted the account of forcible sexual assault that she had told her mother and admitted that she and defendant had consensual sexual intercourse. Based on the evidence that defendant had sexual intercourse with two 14-year-old girls, he was charged with two counts of sexual conduct with a minor under the age of 15 years, class 2 felonies, and dangerous crimes against children.[2] The

---

[2] Defendant was also charged with a third count of sexual conduct with a minor aged 15 years, a class 6 felony, involving a third teenager. However, the jury acquitted him of that charge at trial, and the circumstances involving that incident are not relevant to this review.

state also filed a motion to invoke enhanced punishment by treating a conviction on one count as a prior conviction for purposes of enhancing the other, pursuant to A.R.S. § 13-604(H). See A.R.S. § 13-604.01(A), (H).

Defendant pleaded not guilty[3] but did not appear at trial. Both Mary and Susan testified that their sexual conduct with defendant was consensual and that defendant knew each of them was 14 years old. Officer Pearce testified that, during the interview at the police station, defendant had admitted to consensual sexual intercourse with both girls and acknowledged he was aware of their ages. The jury found defendant

---

3 The record indicates that defendant, against his counsel's advice, rejected the state's offer of a stipulated 5-year sentence for all 3 counts if defendant would enter an agreement to plead guilty. Had the offer been accepted, the state apparently would have amended and reduced the charges to make a 5-year sentence statutorily available.

guilty of two counts of sexual conduct with a minor under 15 years old. The court ordered preparation of a presentence report.

The presentence report indicated that, while on release awaiting trial, defendant voluntarily sought outpatient counseling. His counselor indicated that defendant visited her only once; she "suspected that he feels 'intimidated' by women in his own age group and that this is why he is attracted to younger girls." She also indicated her impression that defendant was "immature for his age."

The report also noted that defendant was married but separated pending a divorce, that his wife was living in Nevada with their 3 small children, and that he had no prior felony convictions. The presentence evaluation included the following analysis and recommendation:

> A reasonably intelligent individual, Bartlett's attraction

> to young girls may very well be a sign of inferiority around women his own age. Further, the description of his early sexual experiences may indicate a long term deep [seated] problem with women and sex. His justification for his sexual conduct seems to rest with the "loose" character of the female involved, regardless of their age. He tends to relinquish any responsibility on his part by appearing to be a passive participant in all of his sexual encounters.
>
> . . . .
>
> Overall, he appears to be an irresponsible and immature 24 year old man who may continue to present a threat to young girls. His lack of any prior felonies coupled with the seriousness of the offenses, may indicate that the presumptive term in [the Department of Corrections] is appropriate.

At sentencing, the court imposed the minimum mandatory sentence on each count: 15 years for the first count as a nonrepetitive dangerous crime against children, and 25 years on the second count as a repetitive dangerous crime against children, to be served consecutively without any possibility of early release. See generally A.R.S.

§ 13-604.01. The court expressed its regret at having to impose such a harsh sentence in the following remarks at sentencing:

> THE COURT: Well, I have very little choice in this regard, to put it mildly. The law in Arizona in connection with an offense of this nature is very stringent. As I have reviewed the law and is indicated in the pre-sentence report, the law provides for a very severe presumptive term on each of the counts. The law also provides that each day of the sentence must be served. The law also provides that the sentences must be consecutive, and the law also provides that the subsequent offense is subject to a more severe presumptive term.
>
> My function, as I view it, is not to second guess the legislature in regard to sentencing, but to follow the law. I took an oath to do that. The law is very severe. . . . The punishment is more severe than in many other types of cases that are very serious offenses. But it is not my function to second guess what the wisdom of the sentence is.
>
> If in fact the sentence is too severe, I think that's for the appellate courts to review. So I really have nothing else to say in regard to sentencing. I'm going to impose the mitigated term, because I think that it is plenty severe in the case.

The court credited defendant with 88 days of presentence incarceration and ordered him to pay $100 to the victim's compensation fund. Defendant timely appealed. The court of appeals affirmed defendant's convictions and sentences and defendant sought review in this court.

The Court of Appeals Decision

Defendant argued on appeal that his confession was involuntary and that his sentence was cruel and unusual. The court of appeals first concluded that the confession was voluntary; that holding is not at issue in this review. In the remaining one-paragraph analysis, the court affirmed defendant's sentence:

> Defendant's argument that the long sentence imposed for sexual conduct with a minor violates the constitutional proscription against cruel and unusual punishment has been twice rejected by this court. State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987); State v. Crego, 154 Ariz. 278, 742 P.2d 289 (App. 1987). We do so again. The remainder of his argument is a heartfelt objection to the consequences of mandatory sentencing on the facts of this

> case. That is better addressed to the legislature. We do not believe courts have either inherent power or power under A.R.S. § 13-4037 to impose a sentence below the statutory minimum.

Defendant petitioned this court for review of this decision; we granted review only of the constitutional issue whether defendant's sentences are unconstitutionally cruel and unusual under the particular facts of this case.

Analysis

1. The Statutory Sentencing Scheme

Defendant was charged with violating A.R.S. § 13-1405, which provides:

> Sexual conduct with a minor; classifications
>
> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.
>
> B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to A.R.S. § 13-604.01. Sexual conduct with a minor

fifteen years of age or over is a class 6 felony.

The fact that a minor under age 18 consents to sexual intercourse is not a defense under the statute. State v. Fristoe, 135 Ariz. 25, 30, 658 P.2d 825, 830 (App. 1982). The statute differentiates between an offense with a minor between the ages of 15 and 18, and an offense with a minor younger than 15, in classifying the former as a class 6 felony and the latter as a class 2 felony.

Because both girls engaged in consensual conduct with defendant before their 15th birthdays, however, these offenses were designated class 2 felonies, and the court was required to apply the more stringent sentencing provisions of the dangerous crimes against children act. See A.R.S. §§ 13-1405; 13-604.01. Under that sentencing scheme, the mandatory minimum sentence for the first offense is 15 years,

the presumptive term is 20 years, and the maximum term is 25 years. A.R.S. § 13-604.01(A), (D). Defendant would not be eligible for probation or early release until the full sentence is served. A.R.S. § 13-604.01(E). Because the first offense is a "predicate felony" that enhances the sentence for the second offense, see A.R.S. § 13-604.01(K)(2), the sentencing range for the second offense increases to a mandatory minimum term of 25 years, a presumptive term of 30 years, and a maximum term of 35 years. A.R.S. § 13-604.01(A), (D). The statute also requires that the second sentence be consecutive to the first, A.R.S. § 13-604.01(J), with no possibility of early release until every day of both sentences has been served. A.R.S. § 13-604.01(E).

The practical effect of these sentencing provisions is that defendant, having received the minimum sentences

within the trial court's discretion on both counts, must serve 40 years in prison for these two offenses. He would be 64 years old before he could entertain the possibility of release.

2. Cruel and Unusual Punishment: Solem v. Helm Analysis

Defendant challenges as cruel and unusual punishment the sentencing provisions of A.R.S. § 13-604.01 only as applied to the facts of his case. In particular, he challenges the mandatory minimum sentences of 15 years for the first offense and 25 years for the second offense as grossly disproportionate to his crimes involving participation in nonviolent, nonincestuous, heterosexual, and consensual sexual intercourse with two willing post-pubescent teenagers. He does not challenge the facial validity of the statute as applied to other, more heinous crimes against children under different circumstances.

The power to define crimes and to provide for their punishment is one held by the legislature. Rummel v. Estelle, 445 U.S. 263, 284-85, 100 S. Ct. 1133, 1144-45, 63 L. Ed. 2d 382 (1980); State v. Marquez, 127 Ariz. 98, 103, 618 P.2d 592, 597 (1980). As a reviewing court, we must give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ." Solem v. Helm, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009, 77 L. Ed. 2d 637 (1983). However, the fact that the legislature enacts a punishment does not conclusively establish its constitutional validity; the eighth amendment prohibition against cruel and unusual punishment is a limit on the legislature's power to mandate penalties. State v. Mulalley, 127 Ariz. 92, 95, 618 P.2d 586, 589 (1980). If we

find a mandatory penalty so severe "as to shock the conscience of society," we must find it cruel and unusual. State v. Davis, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1982). We judge whether the moral sense of the community is shocked by whether the punishment is overly severe or disproportionate to the crime. State v. Taylor, 82 Ariz. 289, 294, 312 P.2d 162, 166 (1957). We analyze such challenges on a case-by-case basis, according to the circumstances of the particular crime, the defendant's personal culpability, and by the perceptions of contemporary society at the time the decision is rendered rather than by our own standards. See generally Mulalley, Taylor.

The United States Supreme Court has enunciated a 3-prong test to determine if a sentence is so disproportionate to the crime as to violate the eighth amendment as cruel and unusual punishment. See

Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). The Solem analysis requires us to examine: (1) the gravity of the offense and the harshness of the penalty; (2) a comparison of other sentences imposed in the same jurisdiction for more serious crimes; and (3) a comparison of sentences in other jurisdictions for the same crime. 463 U.S. at 292. This court previously utilized the same factors, even before Solem v. Helm articulated them, in deciding when a punishment is unconstitutionally cruel and unusual:

> In evaluating the proportionality of a criminal sanction, we will consider not only the nature of the crime and of the offender, . . . but we will compare it with punishments for the same crime in other jurisdictions and for other crimes within our own jurisdiction. Because the "enactments of legislative bodies . . . serve as some index of community standards and values," . . . they help give objective content to the "conscience of society." In comparing the sentence actually imposed with

> sanctions provided in other jurisdictions, we do not, of course, seek to conform our statutes "to the 'majority rule' or the least common denominator of penalties nationwide." . . . Rather we seek evidence of what sanctions are currently considered acceptable in our society for the crime considered.

Mulalley, 127 Ariz. at 96, 618 P.2d at 590. We previously applied the Solem analysis to uphold sentences imposed under A.R.S. § 13-604.01 for other dangerous crimes against children. See State v. Jonas, No. CR-89-0021-PR (Ariz. filed April , 1990); State v. Taylor, 160 Ariz. 415, 422-23, 773 P.2d 974, 981-82 (1989). Our court of appeals has also applied the Solem factors to decide eighth amendment attacks against sentences for crimes against children. See State v. Byrd, 160 Ariz. 282, 284, 772 P.2d 1135, 1137 (App. 1988); State v. Smith, 156 Ariz. 518, 525-26, 753 P.2d 1174, 1181-82 (App. 1987); State v. Crego, 154 Ariz. 278, 280, 742 P.2d 289,

291 (App. 1987). We now determine whether the eighth amendment is violated by applying the mandatory sentencing provisions of A.R.S. § 13-604.01 to this particular defendant under the specific facts of this case.

A. Gravity of the Offense and Harshness of the Penalty

In determining the gravity of the offense, we must examine the type of harm threatened or inflicted and the level of defendant's culpability, measured by the seriousness of the crime, against whom it was committed, and its level of violence. Solem, 463 U.S. at 292-93; Jonas, slip op. at 12.

In enacting the harsh penalties of the dangerous crimes against children act, the legislature determined the crimes against children are among the most serious crimes in our society. By providing lesser penalties for those crimes against children who have reached

the age of 15, the legislature also determined that crimes against children under age 15 are more serious crimes than those against older children. This "line-drawing" functioning is properly the legislature's. See Jonas, slip op. at 16. Additionally, by not providing the defense of consent to sexual conduct with a child younger than 18, the legislature declared that, in its judgment, children below the age of majority are incapable of making a mature decision to engage in sexual conduct. See Fristoe, 135 Ariz. at 30, 658 P.2d at 830 ("When a person has participated in sexual conduct with a minor, he is equally guilty of the crime whether he forced himself upon the minor or whether he succeeds in persuading the minor to allow the sexual act to take place"). But see State v. Puig, 154 Ariz. 624, 628-29, 744 P.2d 725, 729-30 (App. 1987) (although consent is not at issue if

minor is under 15, where minor is older than 15 and defendant reasonably believes the minor to be over 18, consent will be a defense to a sexual abuse charge).

Although the minor's consent will not decriminalize the sexual conduct, that consent is relevant to our inquiry into the gravity of the offense. In this case, both minors were close to the maturity line that the legislature has drawn for less serious offenses. According to their testimonies, both were willing participants in defendant's conduct. Defendant used no violent force or threats against them. Neither girl was physically injured or testified to any emotional trauma. Under these circumstances, we must certainly consider these offenses less grave than the others punishable under the same statutory scheme: second degree murder, sexual assault, taking a child for the purposes

of prostitution, child prostitution, involving or using a minor in drug offenses, aggravated assault, molestation of a child, sexual exploitation of a minor, child abuse, or kidnapping. See generally A.R.S. § 13-604.01.

Additionally, we must consider the minors' proximities to their 15th birthdays. Although the legislature may be forced to draw a "bright line" at a particular age (in this case, at the age of 15) in distinguishing between class 6 and class 2 sexual conduct felonies, a reviewing court can look at a more graduated line, depending on the nature of the individual offense, in deciding the proportionality of the punishment to the crime. Thus, although the fact that both consenting girls were close to their 15th birthdays cannot be used to reduce the crimes from class 2 felonies to class 6 felonies, the punishment imposed for those harsher class 2 felonies must

be proportionate to these individual offenses. And although the legislature has determined that a minor's "consent" to sexual conduct does not excuse its commission, certainly the punishment for consensual sexual conduct with a minor over 14 1/2 years old should be closer to the punishment for sexual conduct with a 15-year-old than to punishment for sexual conduct with a 2-year-old. We thus examine what punishment defendant would have received if the minors were 15.

If Mary and Susan had been two months and six months older, respectively, defendant would have faced sentencing for two counts of a class 6 felony for sexual conduct with a minor 15 years of age. The range of sentencing for the first offense would have been a minimum term of 9 months, a presumptive term of 1.5 years, and a maximum term of 1.875 years. See A.R.S. §§ 13-701(C)(5), -702(A). The trial court would have had

discretion to place defendant on probation and to designate the offense as a class 1 misdemeanor upon successful completion of that probation. See A.R.S. § 13-702(H). If imprisoned, defendant would have been eligible for early release after one-half the sentence had been served. The range of sentencing for the second offense, as a repetitive felony under A.R.S. § 13-604(H), would have been a minimum term of 1.5 years, a presumptive term of 2.25 years, and a maximum term of 3 years. See A.R.S. §§ 13-604(A), -702(H). Defendant would not have been eligible for probation for the second offense, but would have been eligible for early release after one-half the sentence had been served. See A.R.S. § 13-604(A). Defendant's terms could have been imposed either consecutively or concurrently, within the trial court's discretion. See A.R.S. § 13-708. The

sentences defendant actually received were significantly more harsh.

As to defendant's personal culpability, the record indicates that he was an "immature" young man who associated with a younger peer group because of his emotional insecurities, which included a pending divorce after marriage at a young age. He had no prior felony record and no history of assaulting young children. No evidence was presented that he intended to harm these girls, either physically or emotionally. But for his age of 23, this situation would be similar to others in which we have recognized a defendant may have less culpability in a crime resulting from a teenage romance:

> We do not for a moment undertake to minimize the wrong done to the minor child or to in any degree condone it. But we feel that the wrong may be ascribed more to the follies of youth in this era of confusion and frustration than to a wicked and depraved heart.

State v. Telavera, 76 Ariz. 183, 187, 261 P.2d 997, 1000 (1953) (Phelps, J.).

We must also recognize that sexual conduct among post-pubescent teenagers is not uncommon. Other courts have taken such notice:

> It is a fact that many young people male and female, engage in sexual intercourse. In 1976, 2.7% of all 16-year-old girls in the United States, and 6.4% of all 17-year-olds, had borne at least one child. U.S. National Center for Health Statistics, Vital Statistics of the United States, Table 1-17 (1978). About half of these children were illegitimate. Id., Table 1-32. These statistics, including those on abortions (331 reported for every 1,000 live births, U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 56 (1977)), indicate that a great number of unmarried 15- and 16-year-olds have engaged in sexual intercourse resulting in pregnancy and suggest that a greater number have done so without pregnancy.
>
> Without applauding the sexual permissiveness of the times, we can only note that in the social context of the times this type of offense between young people is committed many times without criminal prosecution and that, in ordinary sentencing practice, is not regarded as so serious as to require imprisonment.

State v. Sepulvado, 367 So. 2d 762, 771 (La. 1979).

Measuring the gravity of the offenses in this context, we must compare the harshness of the penalty. The legislature has imposed mandatory minimum consecutive sentences of 15 and 25 years for the first and second acts of consensual sexual conduct with a minor, with no possibility of early release. The trial court thus had no discretion to reduce the penalty according to the individual circumstances that indicated a less serious offense or a less culpable defendant. Defendant, with no prior felony history, has received a 40-year penalty for sexual conduct with two consenting post-pubescent teenagers. The broad application of the statute to encompass this situation results in a penalty grossly out of proportion to the severity of the crime. Although such a harsh penalty may be justified in the

context of other, more heinous crimes included within the sentencing scheme, it is not justified under the specific circumstances of this case.

B. Sentences Imposed for Other Crimes in Arizona

We next examine the sentences imposed in Arizona on defendants who commit crimes more serious than this defendant's. Solem, 463 U.S. at 292; Jonas, slip op. at 19. We have previously disapproved the practice of comparing only those crimes encompassed within the challenged sentencing statute to conclude that the punishment is proportionate because all crimes within the statutory scheme receive the same penalties. See Jonas, slip op. at 19-20, disapproving the analysis in State v. Smith, 156 Ariz. at 526, 753 P.2d at 1182, and State v. Crego, 154 Ariz. at 280, 742 P.2d at 291.

However, a comparison of the other crimes punishable under the same mandatory sentencing provisions of A.R.S. § 13-604.01 is helpful in this case to show that more serious offenses do not receive any greater punishment. For example, second degree murder, forcible sexual assault, taking a child for the purposes of prostitution, or involving a child in a drug offense are all considered first degree crimes against children, subject to the same mandatory minimum sentences of 15 and 25 years that defendant received. A.R.S. § 13-604.01(A), (D). More potentially serious crimes than those committed here, such as aggravated assault, child molestation, child abuse, or kidnapping, are subject to a lesser minimum sentence of 12 years for the first offense and 23 years for the second offense. See A.R.S. § 13-604.01(B), (D).

Other more serious crimes that do not involve children similarly receive lesser penalties than those mandated in this

case. Class 2 felonies not involving a dangerous weapon or threatened physical injury are punishable for a first offense with a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum of 14 years, with early release potentially available after only half the sentence has been served. A.R.S. §§ 13-701, -702. Such first-time offenders are eligible for probation, or, if imprisoned, can earn early release credits of 1 day for each 2 days served. A second offense carries a minimum term of 7 years, a presumptive term of 10.5 years, and a maximum of 21 years, with early release potentially available after two-thirds of the sentence has been served. A.R.S. §§ 13-701, -702, -604(B). The first and second sentences are presumed to run consecutively but the trial court has discretion to make them concurrent by stating its reasons on the record. A.R.S. § 13-708. Included within

this scheme of punishment for class 2 felonies are the following crimes, all potentially more serious than the offenses committed by this defendant: kidnapping, A.R.S. § 13-1304; sexual assault of an adult, A.R.S. § 13-1406; first degree burglary of a residential structure, A.R.S. § 13-1508; and arson of an occupied structure, A.R.S. § 13-1704. Additionally, manslaughter, a class 3 felony, A.R.S. § 13-1103, is punishable with a minimum sentence of 3.75 years, a presumptive term of 5 years, and a maximum term of 10 years. A.R.S. §§ 13-701(C)(2), -702(B).

We also compare the circumstances under which other defendants have been subjected to the same mandatory sentencing scheme. In State v. Taylor, we upheld an aggregate prison term of 2,975 years for 85 counts of dangerous crimes against children. 160 Ariz. 415, 773 P.2d 974 (1989). In that case, the defendant performed and

photographed various sexual acts with children aged from 18 months to 8 years old, and many other unidentified small children. He also had a prior criminal history of sex crimes with young children in two other states. We recognized the "irreparable harm which he has caused to the normal development of numerous children," and his inability "to control his proclivity for sexual conduct with children" as important factors justifying the harshness of the sentence. Taylor, 160 Ariz. at 423, 773 P.2d at 982. In State v. Crego, the court of appeals upheld two consecutive 20-year prison terms for a defendant who molested 3 different victims under age 15 a few months after he had been released from prison for a similar offense, and while he was on parole. 154 Ariz. at 279, 742 P.2d at 290. In State v. Smith, the court of appeals also upheld a mandatory prison sentence of 91 years for a defendant who

repeatedly molested a 10-year-old boy and photographed the numerous incidents on approximately 60 occasions. 156 Ariz. at 520, 753 P.2d at 1176. Defendant also points out other cases in which harsh sentencing provisions were appropriately applied in situations involving repeated and cruel sexual offenses against small children. See, e.g., State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (App. 1985) (defendant, a scoutmaster, performed multiple acts of oral and anal sex on 12- to 13-year-old male victims; was sentenced to 5 concurrent prison terms ranging from 7 to 15.75 years); State v. O'Neill, 117 Ariz. 343, 572 P.2d 1181 (1977) (defendant, while baby-sitting, molested a two-year-old infant, resulting in a tear between her vagina and rectum; was sentenced to 20 years to life). These and other cases stand in stark contrast to the circumstances under which

this defendant was sentenced in this case.

We conclude that a comparison of the punishments imposed for other crimes in Arizona reveals the disproportion with which defendant was sentenced under these factual circumstances.

C. Sentences Imposed for the Same Crime in Other States

We also examine the punishment imposed for the same crime in other jurisdictions. Solem, 463 U.S. at 292. This comparison is difficult because the offenses defendant committed are chargeable as a broad variety of crimes with varying punishments. However, we have attempted to compare penalties for the crimes closest to those committed here: consensual, nonincestuous, heterosexual intercourse with a 14-year-old.

Additionally, we compare each of defendant's sentences individually, keeping in mind that the 15-year sentence was imposed for a first offense, and that the 25-year sentence was imposed for a second offense. We also consider only those sentences imposed for a defendant with no prior felony convictions, other than the first offense used as an enhancement factor for the second offense. Our focus is necessarily on the mandatory minimum sentences imposed in other jurisdictions, because that is what defendant received here. We do not consider significant the state's argument that defendant could have received maximum sentences in other jurisdictions greater than the minimums imposed in this case, because the record clearly indicates that the trial court did not find aggravating factors justifying maximum sentences under these circumstances.

(1) 15-year Sentence for First Offense

In 10 jurisdictions, defendant's offenses would either not be a crime or would be punishable only as a misdemeanor with a sentence of less than one year and/or a fine.[4] For a first felony offense in the remaining jurisdictions, defendant would have faced a minimum

---

[4] See Ark. Stat. § 5-14-106 (third degree carnal abuse, a class A misdemeanor); Cal. Penal Code § 261.5, 264 (unlawful sexual intercourse); Ga. Crim. Code § 26-2010 (fornication); Haw. Rev. Stat. § 707-732 (sexual abuse in the third degree); Ill. Crim. Code § 11-4.1 (contributing to the sexual delinquency of a child); Md. Ann. Code § 27-464(C) (fourth degree sexual offense); Mo. Rev. Stat. § 566.030 (not a felony; age of consent is 14); Pa. Stat. Ann. § 18-3122 (not a felony; age of consent is 14); S.C. Code Ann. § 16-3-655 (not a crime; age of consent is 14); W. Va. Code Ann. § 61-8B-9(a) (sexual abuse in the third degree).

penality of one, two, or three years,[5] with probation often available. Thus,

---

[5]Felony penalties for a first offense in other jurisdictions include the following sentencing ranges: Ala. Code § 13A-6-62 (2 to 20 years); Alaska Stat. §§ 11.41.434, 12.55.125 (1 to 10 years); Colo. Rev. Stat. §§ 18-3-403, 18-1-105 (2 to 8 years); Conn. Gen. Stat. § 53a-71(1), 53a-35a (1 to 10 years); Del. Code. Ann. tit. 11 §§ 773, 4205 (3 to 30 years); Fla. Stat. Ann. §§ 800.04, 775.082 (1 to 15 years); Idaho Code §§ 18-6101, 18-6104 (1 year to life); Ind. Code. Ann. §§ 35-42-4-3(c), 35-50-2-6 (2 to 8 years); Iowa Code § 709.4 (1 to 10 years); Kan. Crim. Code Ann. §§ 21-3503, 21-4501 (3 to 20 years); Ky. Rev. Stat. Ann. § 510.060 (1 to 5 years); La. Rev. Stat. Ann. § 14:80 (1 to 10 years); Me. Rev. Stat. Ann. tit. 17-A, §§ 254, 1252(b) (1 year); Mass. Gen. Laws Ann. Ch. 265, § 23 (1 year to life); Mich. Comp. Laws § 28.788(4)(a) (1 to 15 years); Minn. Stat. Ann. § 609.344(1)(b)(2) (1 to 15 years); Miss. Code Ann. § 97-5-21 (1 to 10 years); Mont. Code Ann. § 45-5-503(3)(a) (2 to 40 years); Neb. Rev. Stat. § 28-319 (1 to 50 years); Nev. Rev. Stat. §§ 200.364(3), 200.368(1) (1 to 10 years); N.H. Rev. Stat. Ann. §§ 632-A:3, 651:2 (1 to 7 years); N.J. Rev. Stat. §§ 2C:14-2(c)(5), 2C:43-6.a, b(2) (2 to 10 years); N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15 (1 to 2 years); N.Y. Penal Law §§ 130.25, 70.00(e) (1 to 4 years); N.C. Gen.

our statute is unique among all jurisdictions in that it imposes a minimum mandatory term of 15 years, which is 5 times higher than that imposed in any other jurisdiction. In all

---

[5](continued)
Stat. §§ 14.202.1, 14-1.1(8) (1 to 10 years); N.D. Cent. Code §§ 12.1-20-03, 12.1-32-01.3 (1 to 15 years); Ohio Rev. Code Ann. §§ 2907.04, 2929(A)(3)(a) (1 to 2 years); Okla. Stat. Ann. §§ 1114(B), 1116 (1 to 15 years); Or. Rev. Stat. §§ 163.355, 161.605 (1 to 5 years); R.I. Gen. Laws §§ 11-37-6, 11-37-7 (1 to 5 years); S.D. Codified Laws § 22-22-1(5) (1 to 15 years); Tenn. Code Ann. § 39-2-605 (1 to 5 years); Tex. Penal Code Ann. § 22.011 (2 to 20 years); Utah Code Ann. §§ 76-5-401(1), 76-3-203(3) (1 to 5 years); Vt. Stat. Ann. tit. 13 § 3252 (1 to 20 years); Wash. Rev. Code §§ 9A.44.079, 9.94A.310, table 1 (1 to 5 years); Wis. Stat. Ann. § 940.225(2)(e) (1 to 10 years); Wyo. Stat. §§ 6-2-304, 6-2-306(iii) (1 to 5 years); D.C. Code Ann. §§ 22-2801, 24-203 (1 year to life).

jurisdictions but Arizona, the sentencing judge has a wide range of discretion in imposing a sentence at the bottom of the statutory range that fits the individual circumstances of the crime. Although the maximum allowable sentence in some jurisdictions would have fallen within the range of sentencing provided for a first offender under A.R.S. § 13-604.01(A), in no jurisdiction would the sentencing judge be required to impose a sentence of more than 3 years for the identical offense. Thus, our legislature has mandated a penalty potentially disproportionate to an individual criminal act or defendant. See J. Howe, Thoughts on Mandatory Sentencing, Ariz. Bar J. June-July 1985, at 24-25.

Such potential disproportionality is not enough to allow us to find defendant's sentences cruel and unusual. See State v. Taylor, 160 Ariz. 415, 773

P.2d 974 (1989) ("Although on the national spectrum Arizona deals with crimes against children more severely than many other states, '[t]he Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how to best administer its criminal laws.' Spaziano v. Florida, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164, 82 L. Ed. 2d 340, 355 (1984)"). Such potential differences in sentencing are "a mark of federalism, not unconstitutionality." State v. Bishop, 717 P.2d 261, 272 (Utah 1986).

In this case, however, the potential disproportion between the sentences defendant received and those sentences actually imposed on other similarly situated defendants in other jurisdictions is actual. Defendant has supplied us with a myriad of examples in the published case law of other jurisdictions. A few representative

citations illustrate his point: Diefenderfer v. State, 745 P.2d 556 (Wyo. 1987) (defendant pleaded guilty to third degree sexual assault of a girl under 14; the execution of his sentence of 3 to 5 years suspended and 4 years probation imposed); State v. DeJesus, 10 Conn. App. 591, 524 A.2d 1156 (1987) (defendant pleaded guilty to second degree sexual assault of a 14-year-old; sentence of 5 years upheld); State v. La Borde, 234 La. 28, 99 So. 2d 11 (1958) (defendant convicted of carnal knowledge of 14-year-old; sentenced to one year, 9 months); State v. Smart, 247 La. 174, 170 So. 2d 365 (1965) (defendant convicted of carnal knowledge of a 13-year old; sentenced to 3 years); State v. Rodriguez, 179 N.J. Super. 129, 430 A.2d 957 (1981) (defendant convicted of sexual assault of a 13-year old; sentenced to 4 years); State v. Newell, 348 S.E.2d 158 (N.C. 1986) (defendant convicted of taking

indecent liberties with a consenting child between 13 and 16; sentenced to 3 years); State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988) (defendant convicted of statutory rape of a 14-year old; sentenced to a term of not more than 3 years, but suspended and defendant placed on probation with 6 months in county jail work release program). Additionally, defendant's appellate counsel has avowed to the court that he "has diligently searched two centuries of case law of each of our 50 sister states. This required the review of just over 2,600 cases. Not one case was found where a similarly situated defendant received an aggravated sentence remotely comparable to that imposed as a mandatory minimum upon Mr. Bartlett."

Given this authority, we conclude that the mandatory minimum sentence imposed on defendant for his first offense was disproportionate to sentences received by

similarly situated defendants in other jurisdictions.

(2) 25-year sentence for second offense

A comparison of the 25-year mandatory minimum sentence defendant received for the second offense with those imposed in other jurisdictions is complicated by the enhancement of defendant's second sentence because the first count was treated as a prior predicate felony. Most jurisdictions punish repeat offenders more stringently, and enhancement of penalties on the basis of prior offenses has been consistently upheld against eighth amendment attacks. See, e.g., Rummel, 445 U.S. at 276; Cocio v. Bramlett, 872 F.2d 889, 893 (9th Cir. 1989). However, we are mindful that the legislature, in requiring a 25-year minimum sentence for a second offense, implicitly assumed that it was enhancing a constitutionally proportionate minimum sentence of 15 years for a first offense.

We have already found the minimum sentence for the first offense to be disproportionate to the facts of this case. Additionally, the "prior" felony in this case was one for which defendant was simultaneously tried and sentenced with the second offense, a factor not existing in other jurisdictions. See A.R.S. § 13-604(H).

Also complicating our analysis is the mandatory consecutive nature of the two sentences, along with the absence of the availability of parole. We have previously refused to find the consecutive nature of two sentences for two separate crimes to be a factor that would render the second sentence disproportionate. Jonas, slip op. at 18. We thus do not consider that factor here.[6] Nonavailability of parole,

---

[6] We do not hold, however, that we would never consider the requirement of consecutive sentences to be a factor in

however, is a factor in determining proportionality, although the absence of parole, in itself, does not make a sentence disproportionate. Solem, 463 U.S. at 297 and n.24; Jonas, slip op. at 18. In this case, the absence of parole availability requires us to consider that defendant will serve the entire 25-year sentence for the second offense.

Despite these difficulties, a comparison of what penalties defendant would face for a second offense in other jurisdictions, although not as clear as the comparison for a first offense, compels the conclusion that defendant would be subject to a much lighter

---

(Footnote 6 continued) determining proportionality. This is not, for example, a case in which consecutive sentences were imposed on a defendant who engaged in one single course of conduct that resulted in separate repetitive crimes with consecutive sentences. In such a case, the consecutive nature of the sentences would perhaps be a factor in deciding proportionality.

minimum mandatory sentence for his second offense in all but one state.

In Nebraska, defendant would be subject to a statutory range of 25 to 50 years for a second conviction of sexual assault involving a consenting child less than 16 years old, and would not be eligible for parole. Neb. Rev. Stat. § 28-319(1)(c), (3). However, as the United States Supreme Court noted in Solem v. Helm, a finding that a defendant could have received an identically harsh sentence in one other state is also a clear indication that he "could not have received such a severe sentence in 48 of the 50 states." 463 U.S. at 299 (emphasis added). Furthermore, we have not been advised by the state of any defendant charged in Nebraska with offenses similar to Bartlett's actually receiving such a harsh sentence. Rather, the published cases that we have found challenging the mandatory Nebraska

sentence for a second offense have involved more heinous offenses, including forcible rape with serious physical injuries to the victim. See, e.g., State v. Brand, 219 Neb. 402, 363 N.W.2d 516 (1985) (defendant received 35-year sentence for his second conviction of first-degree sexual assault involving the use of force; sentence found not disproportionate to crime). Under these circumstances, we cannot find the 25-year mandatory minimum sentence for defendant's second offense to be proportionate merely on the basis of the Nebraska statue.

Except for Nebraska, no other jurisdiction imposes a mandatory minimum sentence of more than 10 years for a second offense similar to defendant's. In no jurisdiction did we find the particularly harsh combination of provisions present here, including both mandatory consecutive sentencing and

nonavailability of parole. We must conclude, therefore, that the 25-year mandatory minimum imposed for defendant's second offense is also disproportionate to the sentences imposed on similarly situated defendants in other jurisdictions.

Based on the above analysis, we hold that defendant's sentences of 15 years for the first offense and 25 years for the second offense are disproportionate to the crimes he committed under the specific facts of this case, and thus violate the eighth amendment proscription against cruel and unusual punishment. This is a narrow holding limited to the facts and circumstances of this case. The Supreme Court has said that successful challenges to the proportionality of particular sentences are "exceedingly rare." Solem, 463 U.S. at 289-90. This is such a rare case.

3. Cruel and Unusual Punishment under the Arizona Constitution

Although this court requested additional briefing on whether defendant's sentence violated either the federal or state constitutional provisions prohibiting cruel and unusual punishment, neither party analyzed the state constitutional provision separately from the federal grounds.

Article 2, § 15 of the Arizona Constitution is identically worded to its federal counterpart prohibiting cruel and unusual punishment. The framers of the Arizona Constitution, "in a rare case of using the federal Constitution as a model," adopted the federal wording "cruel and unusual punishment" over the committee's proposed wording that neither "cruel nor unusual punishment" should be permitted. J. Leshy, The Making of the Arizona Constitution, 20 Ariz. St. L.J. 1, 85 and n.524 (1988), citing Journal of

the [Arizona] Constitutional Convention 463 (Con. P. Cronin Comp. 1925). This deliberate adoption of the federal wording expressed the framers' intent to give legislators wide discretion in imposing methods of capital punishment. See S. Feldman & D. Abney, The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution, 20 Ariz. St. L.J. 115, 122 (1988).

Here, where identically worded federal and state constitutional provisions are alleged to have been violated, when the parties do not argue that the state constitution provides greater protection than does the federal analog, and when we have already found a violation of the federal counterpart, we need not address whether defendant's sentences would have violated the Arizona constitution had they not violated the eighth amendment.

Having concluded that the sentences imposed in this case violate the eighth amendment prohibition against cruel and unusual punishment, we do not address whether they violate art. 2, § 15 of the Arizona Constitution.

Disposition

In his petition for review, defendant argues that we should reduce his sentence to one more proportionate to his crime pursuant to our authority to reduce excessive sentences under A.R.S. § 13-4037(B), which provides:

> If, in its opinion, the conviction is proper but the punishment imposed is greater than under the circumstances of the case ought to be inflicted . . . the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. . . .

The ability to impose "any legal sentence" necessarily implies that we are limited to reducing an excessive sentence to one within the statutory range enacted by the legislature, assuming that range

is constitutional. See Wahl v. State, 39 Ariz. 62, 3 P.2d 1052 (1931); State v. Gourdin, 156 Ariz. 337, 751 P.2d 997 (App. 1988) (a sentence not authorized by law is illegal). Indeed, in prior cases in which we have reduced an excessive sentence under authority of A.R.S. § 13-4037 or its predecessor, A.R.S. § 13-1717, we have imposed a sentence within the range of sentencing provided by the legislature. See, e.g., State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953) (excessive sentence of 10 to 20 years reduced to 7 to 10 years); State v. Seelen, 107 Ariz. 256, 485 P.2d 826 (1971); State v. Flores, 108 Ariz. 231, 495 P.2d 461 (1972); State v. Waldrip, 111 Ariz. 516, 533 P.2d 1151 (1975).

In this case, however, we hold that the statutory range of sentencing under A.R.S. § 13-604.01 cannot constitutionally be applied to defendant's crimes under the facts and

circumstances of this case. We therefore have no available "legal" sentence within the range of A.R.S. § 13-604.01 to impose on defendant.

The state argues that if we find defendant's sentences unconstitutionally cruel and unusual, "appellant must be set free, as he has committed a crime for which there would be no punishment." The state basis its position on the assumption that the underlying substantive offense of sexual conduct with a minor, prohibited by A.R.S. § 13-1405, is so "inextricably united" with the sentencing provisions of A.R.S. § 13-604.01, that sentencing defendant under any other provision of the law would "undermine the intent of the entire statutory scheme." We cannot agree with this proposition.

We do not invalidate defendant's convictions for two counts of sexual conduct with a minor under age 15. Such

offenses have been validly designated class 2 felonies by the legislature. Neither do we hold the sentencing provisions of A.R.S. § 13-604.01 unconstitutional as applied to other defendants under different circumstances. We merely hold that the sentencing provisions of A.R.S. § 13-604.01, which are more stringent than those applied to other class 2 felons, cannot be applied constitutionally to this defendant under these facts and circumstances. The result is to bar application of those provisions to this case, leaving defendant to be sentenced the same as any other class 2 felon to whom the provisions of A.R.S. § 13-604.01 would not apply. Thus, under the remaining statutory range provided for class 2 felonies in A.R.S. §§ 13-701 and -702, defendant could be sentenced within the range that would include, for the <u>first</u>

offense, a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum term of 14 years, of which he would have to serve at least one-half before any possible release. As a first-time nondangerous offender, he would be eligible for probation. For the second offense, defendant's sentence could be enhanced by the first offense, see A.R.S. § 13-604(H), within the range that would include a minimum term of 7 years, a presumptive term of 10.5 years, and a maximum term of 21 years. See A.R.S. § 13-604(B). Defendant would not be eligible for probation for the second offense, and would have to serve at least two-thirds of any sentence imposed before release. A.R.S. § 13-604(B). Defendant's sentences would run consecutively unless the trial court stated on the record its reasons for imposing concurrent sentences. A.R.S. § 13-708.

Such a sentencing scheme can be applied validly to this defendant as a class 2 felon. This wide discretionary range of sentencing will enable the trial court to proportionately tailor the harshness of the penalty to the severity of the crimes. Because we cannot discern from the record before us what sentences the trial court would have imposed had it not felt bound by the mandatory provisions of A.R.S. § 13-604.01, we remand this matter to the trial court for resentencing in accordance with this opinion. We also vacate that portion of the court of appeals memorandum decision that is inconsistent with this opinion.

_____
Robert J. Corcoran, Justice

CONCURRING:

_____
Frank X. Gordon, Jr., Chief Justice

_____
Stanley G. Feldman, Vice Chief Justice

James Duke Cameron, Justice

James Moeleer, Justice

APPENDIX C

13-604.01. Dangerous crimes against children; sentences; definitions

A. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving second degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution or sexual conduct with a minor or involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

B. Except as otherwise provided in this section, a person who is at least

eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving sexual abuse shall be sentenced to a

presumptive term of imprisonment for ten years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years.

D. The presumptive sentences prescribed in subsections A, B and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13-702, subsections C, D and E.

E. A person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served.

F. A person who stands convicted of any dangerous crime against children in the first degree having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31-233, subsection A or B until the person has served not fewer than thirty-five years.

G. Notwithstanding chapter 10 of this title,[1] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree is guilty of a class 3 felony and shall be sentenced to a persumptive term of imprisonment for ten years. The

presumptive term may be increased or decreased by up to five years pursuant to § 13-702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis until the person has served not less than one-half the sentence imposed by the court.

H. Section 13-604, subsections H and I apply to the determination of prior convictions.

I. In addition to the term of imprisonment imposed pursuant to this section and notwithstanding any other law, the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or the board of pardons and paroles deems appropriate for the rest of the

person's life. If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if probation is otherwise authorized, may order that the person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

J. The sentence imposed on a person by the court for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time.

K. In this section:

1. "Dangerous crime against children" means any of the following committed

against a minor under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as defined in § 13-3623, subsection B, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13-3206.

(l) Child prostitution as defined in § 13-3212.

(m) Involving or using minors in drug offenses.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.

2. "Predicate felony" means any felony involving child abuse, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Added by Laws 1985, Ch. 364, § 6, eff. May 16, 1985. Amended by Laws 1987, Ch. 166, § 1; Laws 1987, Ch. 307, § 4.

[1]Section 13-1001 et seq.

APPENDIX D

Minutes of Meeting
COMMITTEE ON JUDICIARY
February 18, 1985

Chairman Skelly announced that H.B. 2145 would be assigned to the Liquor Subcommittee for evaluation and that the members of the Subcommittee are:

Mrs. Wright, Chairman

Mrs. Hermon

Mr. Kromko

Mrs. Rosenbaum

Mr. Skelly

Chairman Skelly stated that the Elections Subcommittee consisting of:

Mrs. Hermon, Chairman

Mr. Hanley

Mr. Higuera

Mr. King

Miss Rockwell

would be assigned the following bills for evaluation:

H.B. 2289, election officer certification programs

H.B. 2489, candidates; residency requirements

H.B. 2500, drivers' license as voter registration

H.B. 2514, election code revisions

H.B. 2516, presidential electors; appointment

H.B. 2548, unfair campaign practices

Chairman Skelly announced that Mr. Hanley was excused to attend a funeral.

S.B. 1021, sexual offenses; child victims.

Chairman Skelly stated that this would be the only bill on the agenda and that a

strike-everything amendment would be offered. Chairman Skelly made the following statement to the members of the Judiciary Committee and to those in the audience:

> "Crimes against children have increased by epidemic proportions not only in the State of Arizona but throughout our Nation. According to an article in the Arizona Republic, February 17, 1985, child abuse has increased 35 percent nationally in the last year. Current figures for the City of Phoenix show that in 1984 as compared to 1983, assaults and aggravated assaults against minors increased by 36 percent, and although rape against minors decreased by four percent, other sex offenders against minors increased by 18 percent. It is not necessary to reiterate to you the tragic happenings in Tucson and Tempe. It is important to note, that Frank Jarvis Atwood has a long history of child molestation and had been released on parole after only serving a short sentence. In addition, Mr. Castaneda was also released on parole and we all know what happened to the little Perry boy.

> I think it is timely that this month's Reader's Digest printed an article entitled, "Why Do We Tolerate These Crimes Against Children?" (Attachment B)
>
> For the edification of the Committee, my office received telephone calls from people who are currently being counseled in the program, Parents United. Both of these individuals are child molesters, and both spoke against the legislation because they said that ". . . some of these little girls look for this." This same individual also said ". . .would you deprive a family of the father just because he has a particular problem with a particular child?"

Chairman Skelly stated that Steve Twist, Attorney General's office, would explain the strike-everything amendment to the committee. (Attachment C)

Steve Twist, Assistant Attorney General, stated that he believes the Legislature needs to place a high priority on this type of legislation because of the nature

of these crimes. He further stated his belief that crimes against children has made many of our urban centers uninhabitable and causes many of us to have fear and frustration over the criminal justice system.

Representative Herstam testified that his original bill concerning fingerprinting of day care workers had been incorporated into the strike-everything amendment and that he supports the strike-everything amendment. He further stated that the need for fingerprinting is obvious since there are over 8,100 day care workers in the State of Arizona caring for over 50,000 children in 750 licensed day carecenters. Representative Herstam asserted that those individuals who have

the responsibility for caring for these children should have to pass basic safety precautions in order to provide a more secure atmosphere for the children in these centers.

Mr. Kromko questioned whether we should extend these security checks to Boy Scout groups, school teachers and other youth-oriented groups.

Mrs. Rhonda DePre' stated her support for the bill and informed the committee that although she is a member of We The People, she was speaking before the committee as a private citizen.

Judge Roger Rudman, Justice of the Peace, stated his support for the bill and

further commented that in his limited tenure as a Justice of the Peace, he is shocked at the number of bizzare and heinous crimes being committed dailyagainst children. Mr. Rudman further stated that recently he had a case where a child had been homosexually abused for over a year and had recently been murdered. Mr. Rudman urged the Committee to unanimously pass the bill.

Miss Joanne Browne spoke in support of the bill and read from a printed statement. (Attachment D)

George Mehl, Chairman, We The People, stated his support for the bill and urged the Committee to pass the bill in order to protect the lives of innocent children.

Al Heinze, Executive Director, Arizona Prosecuting Attorney's Counsel, stated his support for the strike-everything amendment and further stated that videotaping of testimony is not a new concept in the State of Arizona and that this bill simply allows this privilege to be extended to children.

Knox Kimberly spoke on behalf of Congressman John McCain and presented the Committee with a printed statement. (Attachment E)

Mr. Kromko expressed concern about the mandatory prison sentences for kidnapping because he believes that a lot of the kidnapping cases are between custodial and noncustodial parents.

Chairman Skelly assured Mr. Kromko that there is a different statute that covers custodial interference.

Earl Campbell, Executive Director, Arizona Chiefs of Police, stated his support for the strike-everything amendment and stated that he believes stronger laws are needed to protect our children.

Janet Judge voiced her support for the bill and made the following statement to the Committee:

> "My two children were victims of molestation by their natural father. It is very difficult to report these types of crimes because once you report it, you become a victim of the justice system. If the same crimes had been committed against adults,

justice would have been swift. My daughters have friends who have also been molested and they tell their friends not to report it because the system will not help them.

It has been my personal experience that there is no help for the victim and that it seems the system bends over backwards to help the perpetrator and that the molester is the only one the system helps in defending their rights. Why isn't it important to consider the rights of the victim? I have attended meetings at Parents United and what upsets me the most is that there is a lot of talk about feeling sorry for what is happening to the lives of the molesters but you very rarely heard anyone speak up in defense of the children. When I was passing around petitions it was difficult to get signatures quickly because almost everyone had a story to tell about a child they knew who had been molested. The 80,000 people who signed these petitions want the Legislature to know they want this bill passed so that the individuals committing these crimes are removed from the streets.

I am really afraid that the people who counsel child molesters do not

> place the blame on the molesters but make the children feel like they wanted to be a victim. I believe that a molester who doesn't feel like he has done anything wrong is very dangerous."

Chairman Kelly concurred with Ms Judge and further stated that it appears that the philosophy of many people is that if you commit these offenses you have one free shot at it because the State will bail you out.

Chairman Skelly emphasized that he could not accept the philosophy that an individual who molests his daughter for five or six years before he is caught is less guilty than a person who molests a child in the park.

Ms. Judge emphasized that even though it may be the first time a person is

arrested for this type of crime, the molester has usually been victimizing the child for a long period of time.

Barb McDougall spoke on behalf of her victimized daughter and voiced her support for the strike-everything amendment. She further emphasized that because her daughter was mentally retarded, the court had declared her incompetent to testify against the man who had molested her. She further stated that the man who had molested her daughter had previously molested his own daughter, had a criminal record, but had never served any time.

Ms McDougall demonstrated to the Committee the newspaper clippings she had

collected since May 1984 concerning cases of child molestation. Chairman Skelly stated that the record of the meeting should reflect that the newspaper clippings were on a roll of paper and that the roll encircled the Hearing Room.

Chairman Skelly stated that this emphasizes the epidemic proportions of the problem of child molestation.

Michael Hull, Director, Christy Ann Fornoff Foundation, stated his support for the bill and emphasized that a message needs to be sent to society that these crimes will not be tolerated.

Donna Colbert, Ex-Director, Las Familias, Parents United, commended the Committee

for addressing the various issues contained in the bill but expressed concern about how the bill would affect the victim's family.

Dr. John Johnson stated that he was not speaking in opposition to the bill but that he was urging the Committee to evaluate some information before they pass the bill. (Attachment F) Chairman Skelly asked Dr. Johnson if the current law that calls for a maximum of seven years had stopped the murder of Christy Fornoff. Dr. Johnson replied that it had not.

Kathy Swenson, Pima County Adult Probation Department, stated her hesitancy to speak against the bill and

wanted the Committee to know that she is concerned about the effects upon the families of the victims. She stated that she enjoys working with the children and that the responsibility for the molestation lies solely with the offender and that she does not condone the victimization of children.

Thad Curtis, Lieutenant, Pima County Sheriff's Department, stated that his organization was 100 percent in favor of passage of the strike-everything amendment. He further stated that the only opposition to the bill that he is aware of is coming from groups who counsel molesters. He emphasized that he believes the breakdown of the home begins when the child is molested, not when the

father is convicted of the crime.

Terry Raetz spoke in support of the bill and stated that nationwide, the statistics point out that there are approximately 400,000 molesters and that the average molester will victimize 70 children and that only one and one-half percent of convicted molesters will go to prison. She stated that her youngest daughter had been victimized by a man who told her that if she told anyone he would kill her and her mother. She expressed concern that because of the molestation, her daughter now has behavioral problems and worse of all, she has stated, ". . .I never want to grow up because adults don't do fun things." She further stated that her other girl came to her two years

ago and confessed that she too had been a victim. She expressed concern that her daughter is emotionally twelve years old and will be in therapy for the rest of her life. She urged the committee to pass the bill not only for the children of Arizona but to set a trend to protect all children.

Lee Fischler, Executive Director, Parents United, stated that his group is an international organization with local chapters in Arizona. He stated that he works with victims of molestation and that the subject of sexual abuse is a very complicated matter and that it is important that whatever kind of legal response is given, flexibility in the law should be guaranteed. He expressed

concern that if flexibility is eliminated, the Legislature would be destroying law.

Chairman Skelly requested that Mr. Fischler answer the following question with a yes or a no:

> "When you came to visit me at my office at Southwest Saving, I asked you where, in the grand scheme of crimes, did you rank incest? Your answer to me was: "it is like a bad cold." Did you or did you not say that?

Mr. Fischler responded that Mr. Skelly was misrepresenting his remarks and that Mr. Skelly hears only what he wants to hear.

Chairman Skelly stated that he had repeated back this response to Mr. Fischler five times and that he was

not misrepresenting his words and that he had very good hearing.

Chairman Skelly stated that for the edification of the Committee, he firmly believes in counseling for children and wives and for offenders while they are in prison. Chairman Skelly further stated that the Scottsdale Progress had printed an article entitled Who Is Raping The Children and proceeded to read several direct quotes attributed to Mr. Fischler. (Attachment G)

Chairman Skelly stated that he believes there is a school of thought through the United States that you can commit the most bestial, heinous crimes on your own children and when the whistle is blown on

you, all of a sudden you have salvation and you want counseling. He continued to say that this school of thought says that you can do these things for five or six years, sodomizing and molesting your children and when you are caught, you are somehow less guilty than the guy who is caught molesting a child he does not know. Chairman Skelly stated that he believes that is a sick, warped philosophy.

Shirley Carpenter stated her support for the bill and said it is her belief that it is time to take care of our children. She stated that her grandson was grabbed at a public park and that she chased the man in her car and when she caught up with him the man said he was only taking

the child to get a coke. She stated the law should take care of the child not the offender. She further emphasized that she is sick of the molestation and wants something done about the problem.

Kathleene Browne, Director, Organization For Child Development and and American's Children, spoke in support of the bill and urged the Committee to adopt the strike-everything amendment. She stated she is angry about our lack of protection for our children and emphasized that we must take the molestors and lock them up in order to protect the innocent.

Robert Burns, Arizona Association for Child Development and Education, stated

that he wanted the Committee to consider fingerprinting and screening requirements for all child care providers, including those who advertise such services who are not licensed.

Claud Heckman spoke on behalf of his grandchildren who are victims and urged the Committee to pass the bill and commented that he would like to see the bill with tougher language. He stated that his grandchildren begged him not to return them to their home and at the time he did not understand why. He further stated that a few months ago he took his two-year-old granddaughter to the emergency room where the doctors confirmed she had been raped. He expressed concern for the safety of his

grandchildren because although the father had been charged, the charges were dropped due to plea bargaining. He stated that his four-year old grandchild had said, "Daddy promised not to do it anymore Grandpa, but he still does it every day." Mr. Heckman requested that the Committee strengthen the laws so that plea bargaining is not a factor in sentencing these people who commit these crimes.

Noel Carpenter stated his support for the bill and told the Committee that his son and nephew were victims and that he wanted the Legislature to lock the molesters up forever. He stated that he believes that no matter how much counseling these people receive, they will never change.

Anito Mayo, We The People, stated her support for the bill and emphasized to the Committee that it seems that if a man robs a bank it is a crime but if a father robs a child of their innocence, it is negotiable. She questioned why our society encourages this school of thought.

Rachel Opinsky stated her support for the bill but expressed concern about portions of the bill. She provided the Committee with a written statement. (Attachment H)

Steve Goehring, Director, Citizens Against Sexual Assault, spoke in support of the bill and emphasized that he

believes the victims of molestation need protection under the law. He further stated that he believes this bill takes a positive step forward for the State of Arizona. He informed the Committee that Adam Walsh's father had been in the City of Phoenix and that Mr. Walsh had stated that Arizona's laws needed to be brought from 1954 to the 1980's. (Attachment I)

Debbie Carlson, Mother of Vicki Lynn Hoskinson, stated that her daughter had disappeared five months ago Sunday, February 17, 1985 or 155 days today. She made the following comments to the Committee:

> "I could never tell you the anguish and grief our family, friends and Vicki's classmates have suffered through since her disappearance. It is time we realize we need to protect our

children because they are our future. If we do not protect our children, what will it be like fifteen years from now? It has broken my heart and above all else in this world, I want my child back.

In answer to those who call for treatment, how come, Frank Jarvis Atwood was released on parole after so-called treatment, he allegedly kidnapped by daughter. He has a long history of child molestation. He is a pedophyle.

We are being accused of being organized due to emotionalism Well, the only right we seem to have left is emotionalism. I stand before this Committee today to tell you something has to be done. We need to lock up these molesters so that we don't have any more Vicki Lynns, Christie Fornoffs or Perrys. There is no price you can place on a child's life."

Mr. King moved, seconded by Mrs. Wright,

that S.B. 1021, do pass.

Mr. King moved, seconded by Mr. Denny,

that the strike-everything amendment be

adopted. The motion carried.

(Attachment J)

Chairman Skelly stated that a technical amendment was before the Committee and he urged the Committee to adopt it.
Mr. King moved, seconded by Mrs. Wright, that the printed amendment dated 2/18/85, 10:45 a.m. be adopted. The motion carried. (Attachment K)

Mrs. Wright expressed concern that the bill deals with child molestation in the home just as it is dealt with outside the home.

Mr. Giordano stated that he believes that child molestation is becoming more of a problem because there is more of an

acceptance of sexual perversion in our society. He emphasized that he believes it goes back to the disregard for unborn children and that society seems to promote the philosophy of the strong over the weak.

Mr. King moved, seconded by Mrs. Wright, that S.B. 1021, as amended, do pass. By a roll call vote of 13-0-0-2, the motion carried. (Attachment L)

Without objection, the meeting adjourned at 11:30 a.m.

(Attachments are on file in the Office of the Chief Clerk and the Committee Secretary)

APPENDIX E

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROL ELIGIBLE
* ALABAMA	13 A-6-62 Class B Felony Rape 2° 13 A-6-61 Class A Felony	12-16 yrs < 12 yrs	≠ > 20, or < 2 yrs Life or ≠ >99 yrs, nor < 10 yrs	Habit. offenders (> 1 conv.) If Class B Felony, treated as Class A; if Class A, Life or ≠ > 99 yrs, nor < 15 13-A-5-9	Yes.	Yes.
* ALASKA	11.41.434 1° sexual abuse of a minor 11.41.438 2° sexual abuse of a minor Class B Felony	< 13 yrs 13, 14 or 15 yrs	§ 12.55.125 ≠ > 30 yrs; if 1st conv., 8 yrs; if 2nd, 15 yrs; if > 2, 25 yrs/≠ > 10 yrs, nor < 4 yrs, if 2nd conviction	Mandatory if 1° or 2nd offense Sentence not suspendable	Consecutive available.	Not if 2nd offense.
* ARIZONA	13-1405(B) Class 2 Felony Punishable under 13-604.01 Class 6 Felony	< 15 yrs > 15 yrs	15, 20, 25 13-604.01	15 min. -- if 2nd offense, 25 min. 20 pres. / 25 agg. can get between 40 - 60 yrs for 2 offenses	Yes (Mandatory).	Not until sentence serve
ARKANSAS	5-14-104 Class B Felony (1° carnal abuse) 5-14-106 Class A Misdemeanor (3° Carnal Abuse)	< 14 yrs < 16 yrs; Defendant > 20 yrs	≠ < 5 yrs nor > 20 yrs ≠ > 1 yr	If convicted of > 1 Felony, ≠ < 10 nor > 30 yrs.	Yes, if ordered. Aggreg. of consecutive terms for misde meanors ≠ > 1 yr.	
CALIFORNIA	261.5 Unlawful sexual intercourse with female under 18 yrs	< 18 yrs	≠ > 1 yr + possible fine ≠ > $70.00	If subsequent offense tried separately, enhance by 5 yrs to run consecutive.	If subsequent o fense.	No probation if 2 or mor felonies.
COLORADO	18-3-403 Sexual assault on child Class 4 Felony	< 15 yrs	≠ < 2 yrs nor > 8 yrs or ≥ 1 day or life 18-1-105	Mandatory -- sex offenders may be sentenced to indeterminate terms if 3 convictions, ≠ < 25, nor > 50 yrs. 16-13-101	Yes, in court's discretion.	Possible when Parole Board thinks he's ready after serves sentence imposed less credit for good time.
CONNECTICUT	§ 53a-71 Sexual assault in 2° Class C Felony	< 16 yrs	≠ < 1 nor > 10 yrs § 53 a-35a	9 mo's ≠ suspendable or reduceable Determinate sentencing.		

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
* DELAWARE	§ 773 Unlawful sexual intercourse in 3° -- Class B Felony	< 16 yrs	3-30 yrs + fine	4 time offender -- Life imprisonment in court's discretion. If multiple offender, may receive sent. > max. for 1st offense on subsequent offense.		Yes, but not after 3rd conviction.
* DISTRICT OF COLUMBIA	22-2801 Carnal knowledge Sexual Intercourse 22-3501 Indecent acts with children. (No Intercourse)	< 16 yrs < 16 yrs	Any term of years or for life. Neither consent nor mistake of age = defense ≠ > 10 yrs	Yes. If 2nd offense, may receive 1 1/2 times max. prescribed for offense. 22-104. If > 2 priors, may receive life. 22-104a		Must serve minimum sentence.
* FLORIDA	§ 800.04 Sexual Battery 2° Felony 794.011(1)(h)	< 16 yrs < 12 yrs	≠ > 15 yrs Capitol offense - Life without parole for 25 yrs. Ignorance of age ≠ defense Consent ≠ defense	775.084 -- habitual offender increases penalty to ≠ > 30 yrs.		
* GEORGIA	16-6-3 Statutory Rape	< 14 yrs	≠ < 1 nor > 20 yrs	Subsequent offense gets max. for 2nd, subject to probation or suspension by court. 4th offense -- max. sent. and not eligible for parole.	Yes, in court's discretion.	On 4th conviction, no parole available.
HAWAII	707-736 Sexual abuse 1° Class C Felony 707-737 Sexual abuse 2° Misdemeanor	< 14 yrs 14-16	Indeterminate, but if repeated, 5 yrs. ≠ > 1 yr	If 2nd offense, 1 yr 8 mo. 706-606.5 If 3rd offense, 3 yrs 4mo. 3 priors, 5 yrs.	Yes, in court's discretion.	No parole if prior conviction.
* IDAHO	18-6101 Rape	< 18 yrs	≠ < 1yr to Life, In Court's discretion		Yes, in court's discretion.	
ILLINOIS	38-12-16 Agg. criminal sexual abuse Class 2 Felony	13-17 Defendant > 5 yrs older	≠ < 3 yrs nor > 7 yrs § 38-1005-8-1	If previous conviction 1005-5-3	Yes, in court's discretion. 1005-8-4	

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
INDIANA	35-42-43 Child molestation Class C Felony	12 - 16 yrs	Fixed term of 5 yrs ± 3 yrs for aggravation or mitigation.	May suspend any part of sentence in excess of min.	If subsequent offense.	
* IOWA	709.4 Sexual abuse in 3° Class C Felony	14 or 15 yrs Defendant 20 or 21 yrs or older	≠ < 10yrs + fine	Repeat offender = ≠ > 15 yrs	In trial court's discretion. 901.8	
* KANSAS	21-3503 Indecent liberties with child Class C Felony	< 16 yrs	Min: ≠ <3 yrs nor > 5 yrs Max: ≠ < 10 yrs nor > 20 yrs	If 2nd offense -- ≠ < least, nor 2 times greatest min. sent. for min. (up to 10) ≠ < least nor 2 x greatest max. sent. (up to 40)		
KENTUCKY	510.060 Rape in 3° Class D Felony	< 16 yrs Defendant > 21 yrs	≠ < 1 yr nor > 5 yrs	Court may reduce sent. if found unduly harsh to ≤ 1 yr.	In trial court's discretion.	Available.
* LOUISIANA	§ 80 Carnal knowledge of juvenile	12 - 17 yrs	≠ > 10 yrs	§ 529.1 Subsequent offense ≠ < 3.3 yrs or > 20 yrs. If 2 previous convictions, ≠ < 5 yrs or > 20 yrs.	Consecutive unless trial court directs concurrent. 883.	No parole or probation.
MAINE	17A 254 Sexual abuse of a minor Class D Felony	14 - 16 yrs	§ 1252. ≠ 1 yr			Probation available. ≠ > 1 yr.
MARYLAND	§ 463 2° Rape -- Violent Crime 464C 4° Sexual offense Misdemeanor	< 14 yrs 14 or 15	≠ > 20 yrs ≠ > 1 yr or fine or both	3rd offense ≠ < 25 yrs for violent crime. 4th offense of violent crime gets life sentence. § 643B		≠ > 1 yr.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
* MASSACHUSETTS	265 § 23 Rape and abuse of child	< 16 yrs	Life or any number of yrs for 1st offense	If subsequent offense, ≠ < 5 yrs. up to life or any # of yrs.		
* MICHIGAN	28.788(4) Criminal sexual conduct in 3rd degree	13 - 16 yrs	≠ > 15 yrs	If subseqt, mand. min. of 5 yrs (pre - 1988). If subseqt, may get max. term ≠ > 22.5 yrs. If 3rd conviction may get 30 yrs.		No parole prior to serving min. sentece imposed. 28.2303(3)
MISSISSIPPI	§ 97-5-21 Seduction of child under 18	< 18 (previously chaste)	≠ > 10 yrs	If ≥ 2 priors, gets maximum	At trial court's discretion.	No parole or release, if 2 or > convictions. No probation, either.
MISSOURI	§ 566.040 Sexual assault in 1° Class C Felony	14 or 15 yrs	558.011 ≠ > 7 yrs	If > 2 Felonies, ≠ > 15 yrs	In trial court's discretion.	Probation available.
MINNESOTA	609.344 Criminal sexual conduct in 3°	13 - 16 yrs Defense if defendant believes victim ≥ 16 Consent ≠ defense	If Defendant ≤ 48 mo's older , ≠ > 5 yrs. If Defendant > 48 mo's older, ≠ > 10 yrs.	If subsequent offense, ≠ < 3 yrs., nor > max.	In trial court's discretion. Shall not exceed 40 yrs, unless life sentence.	Parole possible in D.O.C.'s discretion, after any period served.
* MONTANA	45-5-503 Sexual intercourse without consent	< 16 yrs	≠ < 2 yrs nor > 40 yrs + fine ≠ > $50,000	Subsequent offense: ≠ < 5 yrs nor > 100 yrs. 46-18-502		May not defer imposition of sentence. 46-18-201
* NEBRASKA	28-319 Sexual assault in 1° Class 2 Felony	< 16 yrs	1 - 50 yrs	2nd offense, ≠ < 25 yrs mandated. Sentences may be increased for habitual criminals.		Not eligible for parole on 2nd conviction.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
NEVADA	200.364 Statutory sexual seduction	< 16 yrs (consent)	≠ < 1 yr nor > 10 yrs + fine ≠ > $10,000	207.010 If ≥ 2 prior felony convictions, gets ≠ < 10 nor > 20 yrs.	In trial court's discretion. 176.035	
* NEW HAMPSHIRE	632-A:3 Felonious sexual assault Class B Felony	13 - 16 yrs	≠ < 1 yr nor > 7 yrs + fine ≠ > $2000	If 3rd offense, life imprisonment 651:6	Trial court has discretion.	After serving min. term, may receive parole. 651-A:6
* NEW JERSEY	2C:14-2 Sexual assault 2° Crime	13 - 16 yrs	10 - 20 yrs + fine ≠ > $100,000	2nd offense, must serve min. 5 yrs imprisonment without possibility of parole	In trial court's discretion.	2nd offender not eligible for non-custodial disposition.
NEW MEXICO	30-9-11(D) Criminal sexual penetration in 4° 4° Felony	13 - 16 yrs	18 mo's imprisonment (court may alter under other provisions) 31-18-15 fine = $5000	31-18-17 = habitual offender 2nd offense -- sentence increased by 1 yr. 3rd offense -- increase by 4 yrs. 4th offense by 8 yrs.		If 2nd offense, no suspension or deferral of sentence. Parole of 1 yr required after sentence served . 31-21-13.1
NEW YORK	§130.25 Rape in 3° Class E Felony	Victim < 17. Defendant > 21 yrs.	≠ < 1 yr nor > 4 yrs. (indeterminate)	2nd offense ≠ < 3 nor > 4	In trial court's discretion.	
NORTH CAROLINA	14-202.1 Taking indecent liberties with children Class H Felony	< 16 yrs	≠ > 10 yrs + fine	Conviction of 3 or more felonies = habitual criminal. Must serve min. 7 yrs without parole. 14-7.6. Classified Class C Felony -- up to 50 yrs or life or fine or both.	Yes, if habitual offender.	No parole for habitual offender for 7 yrs.
* NORTH DAKOTA	12.1-20-03. Gross sexual imposition Class A Felony	< 15 yrs	≠ > 20 yrs, + fine of ≠ > $10,000 or both	3rd offense, court may impose life sentence. 12.1 -32-09	In trial court's discretion.	Mandatory parole available only after entire sentence served.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
OHIO	§ 2907.4 Corruption of minor 3° Felony	12 - 15 yrs	2 yrs, 30 mo; 3 yrs or 4 yrs as minimum, to maximum of 10 yrs. (court sets definite term)	Habitual offender if 2 or more convictions	In trial court's discretion.	Probation in trial court's discretion.
* OKLAHOMA	21 § 1111 Rape 2° If < 16, but victim > 14	< 16 yrs	≠ < 1 yr nor > 15 yrs + fine ≤ $10,000 min. sentence ≠ < 1/3(Max)	If subsequent offense, ≠ < 10 yrs. If 3rd offense, ≠ < 20 yrs. § 51		Yes.
OREGON	163.355 Rape 3° Class C Felony	< 16 yrs	≠ > 5 yrs + fine ≠ > $100,000		In trial court's discretion after making certain findings § 137.22 and 137.23 court may reduce to Class A Misdemeanor	Available.
* PENNSYLVANIA	18-3122 Statutory Rape 2° Felony 18-3123 Involuntary deviant sexual intercourse -- 1° Felony	< 14 yrs < 16 yrs	≠ > 10 yrs 18-106 > 10 yrs	§ 9714 2nd offense is mandatory 5 yrs minimum if prior violent offense.	Discretion.	Probation available. Parole: if sentence is < 30 yrs.
* RHODE ISLAND	11-37-8.1 1° Child molestation sexual assault 11-37-6 3° sexual assault	≤ 14 yrs 14 - 16 yrs	≠ < 20 yrs to life ≤ 5 yrs	Yes. Yes.	≠ < 2 times min. sentence, if subsequent offense as minimum	
* SOUTH CAROLINA	16-3-655 Criminal sexual conduct with minors in 2°	11 - 14 yrs	≠ > 20 yrs	1/4 sentence = mandatory	In trial court's discretion.	Probation available. Parole: if sentenced to ≠ > 30 yrs, eligible after 1/3. If 30 yrs to life, eligible after 10 yrs.
SOUTH DAKOTA	22-22-1 Rape 2° Class 3 Felony	10 - 16 yrs	≠ > 15 yrs, + $15,000 fine	2nd offense -- 3/8 of sentence & increases to ≠ > 25 yrs. (becomes Class 2 Felony)	In trial court's discretion.	If 2nd offense, eligible after deducting good time minus 3/8 time remaining.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
TENNESSEE	39-2-605 Statutory Rape Felony	13 - 18 yrs	≠ > 5 yrs			
* TEXAS	22.011 Sexual assult 2° Felony	< 17 yrs	≠ < 2 yrs nor > 20 yrs + fine ≠ > $10,000	Repeat offender = 1° Felony Life or any term ≠ > 99 yrs or < 5 yrs.		
* UTAH	76-5-401 Unlawful sexual intercourse 3° Felony 76-5-404 Forcible sexual abuse 2° Felony	< 16 yrs < 14 yrs (but not amounting to rape)	≠ > 5 yrs + fine of ≠ > $5,000	76-3-408 Life imprisonment possible. Enhanced sentence for repeat 2° felony offenders -- 3 yrs more.	Consecutive sentences may be imposed in trial court's discretion.	Probation available. Parole if NO prior.
* VERMONT	§ 3252 Sexual assault	< 16 yrs	≠ > 20 yrs or fine ≠ > $10,000 or both.	Yes.	In trial court's discretion.	Eligible after minimum term served. Probation available.
VIRGINIA	18-2-63 Carnal knowledge of child between 13 &15. Class 4 Felony Consent = defense only if Defendant is a minor also.	13 - 15 yrs	≠ < 2 yrs nor > 10 yrs		May get consecutive in trial court's discretion.	Sentence may be suspended or modified during term of imprisonment Probation available only if first offense.
VIRGIN ISLANDS	§ 1702 Rape in 2°	13 - 16 yrs	≠ > 10 yrs			
WEST VIRGINIA	61-8B-2 (lack of consent) 61-8B-5 (sexual assault in 3°) Felony	< 16 yrs	≠ > 1 yr nor > 5 yrs + fine ≠ > $10,000	If subsequent offense, add 5 yrs to max. sentence. If 3rd conviction, gets life imprisonment.	Consecutive, unless court orders concurrent. 61-11-21	

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY / REPEAT SENTENCING / OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
WASHINGTON	9A.44.090 (prior to 7-1-88) Statutory Rape in 3° 9A.44.079 (eff. 7-1-88) Rape of child in 3° (both Class C Felonies)	14 - 16 yrs 14 - 16 yrs	6 mo. - 6 yrs, 2 mo.	Enhanced per point system in offender scoring process.	If certain conditions apply.	
* WISCONSIN	940.225 Sexual assault in 2° Class C Felony	12 - 18 yrs (prior to 7-1-89) 12 - 16 yrs (eff. 7-1-89) Person < 15 is unable, as matter of law, to consent.	≠ > 10 yrs or fine ≠> $10,000 or both. 939.50	If subsequent offense, may increase sentence on 2nd offense by up to 6 yrs. 939.62		Probation available.
WYOMING	6-2-304 Sexual assault in 3° 14-3-105 Immoral or indecent acts	< 16 yrs < 19 yrs	≠ > 5 yrs, if first offense ≠ > 10 yrs or fine or both	≠ > 10 yrs, if subsequent offense.		Probation available.

LEGEND

<	less than	max	maximum
>	more than	min	minimum
≠ >	not more than	sent	sentence
≠ <	not less than	eff	effective
≠	not	conv	conviction
=	is or equal to		

* States having potential sentencing parameters consistent with those in Arizona.